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Volume 39 No. 4 2006

TRIBUTE

A Tribute to Justice Jon D. Krahulik
The Honorable Justice Frank Sullivan, Jr.

2005 SURVEY OF RECENT DEVELOPMENTS IN INDIANA LAW

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(ISSN 0090-4198)

Published four times a year by Indiana University. Editorial and Business Offices are located at:

Indiana Law Review
Lawrence W. Inlow Hall
530 W. New York Street
Indianapolis, IN 46202-3225
(317) 274-4440

Subscriptions. Current subscription rates for an academic year are \$30.00 (domestic mailing) and \$35.00 (foreign mailing) for four issues. Unless the Business Office receives notice to the contrary, all subscriptions will be renewed automatically. ***Address changes must be received at least one month prior to publication to ensure prompt delivery and must include old and new address and the proper zip code.***

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The INDIANA LAW REVIEW (ISSN 0090-4198) is the property of Indiana University and is published quarterly by the Indiana University School of Law—Indianapolis, which assumes complete editorial responsibility thereof. Current subscription rates for an academic year are: one year domestic \$30.00; foreign \$35.00. Send all correspondence to Editorial Specialist, *Indiana Law Review*, Indiana University School of Law—Indianapolis, Lawrence W. Inlow Hall, 530 W. New York Street, Indianapolis, Indiana 46202-3225. Publication office: 530 W. New York Street, Indianapolis, Indiana 46202-3225. Periodicals postage paid at Indianapolis, Indiana 46201.

POSTMASTER: Send address changes to INDIANA LAW REVIEW, Lawrence W. Inlow Hall, 530 W. New York Street, Indianapolis, Indiana 46202-3225.



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**FROM THE STATE HOUSE TO THE
SCHOOLHOUSE: RELIGIOUS EXPRESSION IN
THE PUBLIC SPHERE**

FRIDAY, SEPTEMBER 29, 2006
8:30 A.M. — 1:30 P.M.

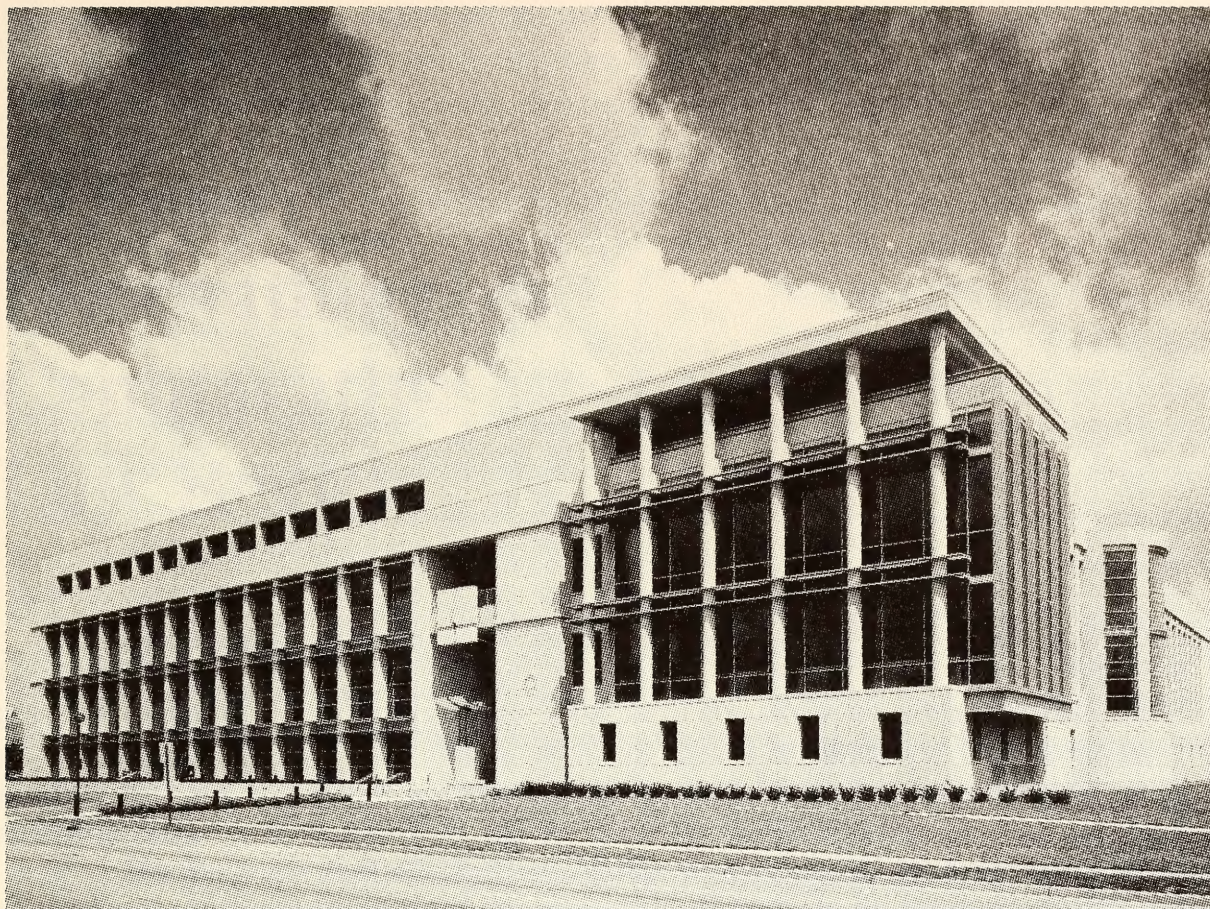
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Does religion have a place in state governments and in public schools? If so, how does law define that role? In creating a place for students to learn about religion in the public school setting, where does the authority of the state end and that of the local school district begin? Who should ultimately be deciding how religion is addressed in public school classrooms? The state citizens, the local taxpayers, the school district board, the teachers, the parents? The Program on Law and State Government and the *Indiana Law Review* welcome your participation in the 2006 Program on Law and State Government Fellowship Symposium.

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Indiana Law Review

Volume 39

2006

Number 4

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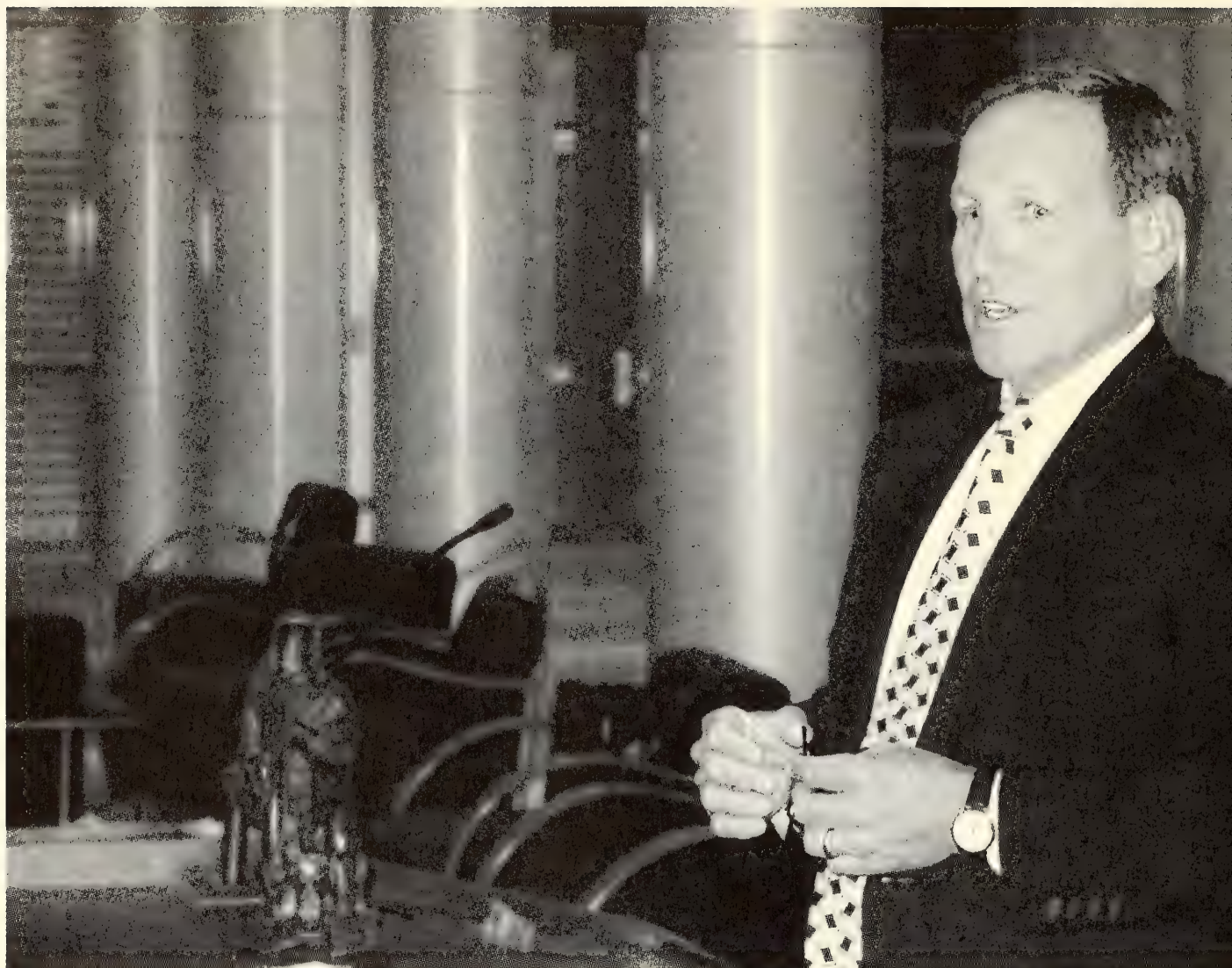


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JUSTICE JON D. KRAHULIK

Indiana Law Review

Volume 39

2006

Number 4

TRIBUTE

A TRIBUTE TO JUSTICE JON D. KRAHULIK

FRANK SULLIVAN, JR.*

Former Indiana Supreme Court Justice Jon D. Krahulik passed away on September 6, 2005. It was a terrible loss to his wonderful family and his many, many friends. It was a terrible loss, too, to Indiana law.

Jon Krahulik was a hard-working member of the editorial board of this journal, a proud alumnus and strong supporter of the law school that publishes it, a practicing lawyer of considerable distinction, and a beloved mentor of more than a generation of younger lawyers. Much could be said of his work in each of these regards. I choose to focus in this tribute on Jon Krahulik's significant, lasting, positive mark on Indiana jurisprudence.

Jon Krahulik's contributions to Indiana jurisprudence came first—and last—as an advocate. In hundreds of cases in state and federal court, the force of his argument and strength of his reasoning influenced the outcome of cases great and small, affecting the path of Indiana law as they were decided. Two of the best known of these, *State Election Board v. Bayh*,¹ and *Ritter v. Stanton*,² influenced Indiana's political and tort landscape in profound ways.

Jon Krahulik's client in the *State Election Board* case, Evan Bayh, as Governor, subsequently appointed him to the Indiana Supreme Court. Justice Krahulik took his seat on the bench in January 1991, just as the court began to benefit from a 1988 amendment to the state constitution that gave the court much greater freedom to select the cases on its docket. Prior to the constitutional amendment, the court had been required to spend most of its time on criminal cases; now it would be able to select those cases—particularly civil cases—that most required supreme court attention.

During his nearly three-year tenure on the court, Justice Krahulik was a prolific writer of opinions in both civil and criminal cases. By my count, he authored 141 majority opinions, nearly half on civil law topics. A review of these writings leads me to make the following observations about his jurisprudence.

First, there is an unmistakable theme running through his opinions of a deep and abiding faith in the jury system. This is perhaps best illustrated in a capital murder case, *Kennedy v. State*,³ in which the trial judge had sentenced the

* Justice, Indiana Supreme Court. A.B., 1972, Dartmouth College; J.D., 1982, Indiana University School of Law—Bloomington.

1. 521 N.E.2d 1313 (Ind. 1988).

2. 745 N.E.2d 828 (Ind. Ct. App. 2001), *trans. denied*, 774 N.E.2d 506 (Ind. 2002).

3. 620 N.E.2d 17 (Ind. 1993).

defendant to death even though the jury had recommended life. Justice Krahulik's opinion for the court directed that the jury's recommendation be followed. And in at least a dozen of his civil law opinions, summary judgment or judgment on the pleadings was reversed because, in his view, issues of fact for the jury remained.⁴ His philosophy in this regard (as well as his clear and straightforward writing style) is illustrated in the opening and closing lines of *Ross v. Lowe*:⁵ "Does a landowner fulfill his duty to invitees by fencing his yard and leaving the family dog in the care of his twelve-year old daughter? Not necessarily. . . . The jury should have been allowed to resolve these factual issues."⁶

Second, Justice Krahulik felt that it was important to keep the theories of recovery under contract and tort law separate. His opinions in *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*,⁷ *Martin Rispens & Son v. Hall Farms, Inc.*,⁸ and *Reed v. Central Soya Co.*⁹ illustrate his efforts to maintain bright lines between tort and contract actions. And in *Erie Insurance Co. v. Hickman*,¹⁰ he stepped up to the plate and created a new cause of action in tort—for the breach of an insurer's duty to deal in good faith with its insured—when necessitated by a corresponding holding that such an action did not lie in contract.¹¹

Third, Justice Krahulik's opinions were characterized by his willingness to speak to the legislature on legal anomalies that he believed were created by certain statutes. A good illustration of this is in his opinion in *Templin v. Fobes*,¹² where he cites three examples of "difficulty encountered when one of the plaintiff's claims is subject to [comparative fault] but another is not" because of the statute exempting government from the Comparative Fault Act.¹³

There are many additional observations that could be made about the contributions of Justice Krahulik—other major contributions in the criminal and civil law areas, contributions in the area of procedure, particularly the creation of the Indiana Rules of Evidence, and contributions to the profession, such as his

4. See *Belding v. Town of New Whiteland*, 622 N.E.2d 1291 (Ind. 1993); *Quakenbush v. Lackey*, 622 N.E.2d 1284 (Ind. 1993); *Shourek v. Stirling*, 621 N.E.2d 1107 (Ind. 1993); *Martin Rispens & Son v. Hall Farms, Inc.*, 621 N.E.2d 1078 (Ind. 1993); *Ross v. Lowe*, 619 N.E.2d 911 (Ind. 1993); *Jordan v. Deery*, 609 N.E.2d 1104 (Ind. 1993); *Malachowski v. Bank One, Indianapolis*, 590 N.E.2d 559 (Ind. 1992); *Wehling v. Citizens Nat'l Bank*, 586 N.E.2d 840 (Ind. 1992); *McCarty v. Hosp. Corp. of Am.*, 580 N.E.2d 228 (Ind. 1991); *Shuamber v. Henderson*, 579 N.E.2d 452 (Ind. 1991); *Allied Resin Corp. v. Waltz*, 574 N.E.2d 913 (Ind. 1991); *Cullison v. Medley*, 570 N.E.2d 27 (Ind. 1991).

5. 619 N.E.2d 911 (Ind. 1993).

6. *Id.* at 913, 915.

7. 608 N.E.2d 975 (Ind. 1993).

8. 621 N.E.2d 1078 (Ind. 1993).

9. 621 N.E.2d 1069 (Ind. 1993).

10. 622 N.E.2d 515 (Ind. 1993).

11. *Id.* at 519.

12. 617 N.E.2d 541 (Ind. 1993).

13. *Id.* at 544 n.1.

support while a member of the court for Interest on Lawyers Trust Accounts (“IOLTA”) program.¹⁴ Discussion of those contributions would be well worth serious scholarly attention in the future. But even this limited review makes clear that in opinion after opinion, both criminal and civil, Justice Krahulik helped give new law that resolved unanswered questions and updated old rules to the needs of the 1990s.

As a member of the Indiana Supreme Court, Justice Jon D. Krahulik made a significant, lasting, and positive mark on Indiana jurisprudence and we are all the better for his service. We shall miss him greatly.

14. See IND. PROF’L CONDUCT R. 1.15(f)-(g); Indiana State Bar Association, IOLTA: Interest on Lawyers Trust Accounts, <http://www.inbar.org/content/iolta/ioltaintro.asp> (last visited June 1, 2006).

INDIANA'S PLACE IN AMERICAN COURT REFORM: RARELY FIRST, OCCASIONALLY LAST, FREQUENTLY EARLY*

RANDALL T. SHEPARD**

Where do Indiana courts stand in the larger story of reinventing America's courts? Where does Indiana fit in this broad effort at reform, and what do we contribute to it?

I. PRESENT OBJECTS OF NATIONAL REFORM

To assess Indiana's place, one must first enumerate the areas in which the nation's state courts face the greatest challenges.

A. *Globalization*

Justice John Paul Stevens gave a speech recently in Indianapolis about the effects of a globalizing world economy on the American court system and on the American legal profession. When an American employer strikes a commercial deal with a business partner in Asia or Europe, both parties need to understand how their own domestic law and customary international law will affect the transaction. Likewise, lawyers for the American company and lawyers for the company overseas need to help facilitate that transaction by plying their trade far away from the place where they are licensed. America's state courts, as regulators of the bar, are actively examining how to support those arrangements, which are so important to our domestic economy.

The legal profession is likewise engaged in a massive effort to help new democracies—like those in Kosovo, Ukraine, Iraq, and Afghanistan—establish the rule of law, believing as most Americans do that a world with more democratic states possessing stable legal systems will be a safer place.¹ This effort proceeds through training judges and lawyers in such places and through a high level of exchange visits.

And, of course, globalization shows up in every state's back yard in the form of immigrants for whom English is not the first language. State courts are active in devising ways to assure such people access to justice. Many people with language issues are too poor to even hire lawyers, let alone interpreters, and finding new ways to provide legal help to them and to other low-income Americans is a national priority.

* This is a revised version of the 2006 State of the Judiciary Address given by the Chief Justice of Indiana to a joint session of the Indiana General Assembly in the House of Representatives Chamber at the Indiana State House on January 12, 2006.

** Chief Justice of Indiana. A.B., 1969, Princeton University; J.D., 1972, Yale Law School; LL.M., 1995, University of Virginia School of Law.

1. Condoleeza Rice, Secretary of State, Remarks at the American Bar Association's Rule of Law Symposium (Nov. 9, 2005), *available at* <http://usinfo.state.gov/dhr/Archive/2005/Nov/10-814789.html>.

B. Families

Thousands of American judges spend every day asking themselves, “What can we do to strengthen American families and improve the lives of children?” A national commission released a landmark report in 2004 that examined how all levels of government can do better for abused and neglected children.² This led to a remarkable national summit in October 2005 of leaders in state courts and child protection; agencies gathered to develop action plans to make that happen.³

C. Ethics in Government

Judges and lawyers are in the middle of a major national effort to revise the rules of ethics that apply to judges so that we can assure our fellow citizens that fidelity to high standards is part of their judiciary. The scandal in Congressional lobbying makes this need ever more apparent.⁴

D. Correction, Guilt, and Innocence

The growing number of people in American jails and prisons compels a search for an effective, less expensive means of dealing with offenders and deterring repeaters. The latest inventive projects with this aim focus on courts as institutions that help solve problems rather than as places that simply try cases. Judges and others have devised what are called “problem-solving courts”: drug courts, neighborhood courts, mental health courts, and re-entry courts, to name a few.⁵

E. New Age and New Law

At least since deTocqueville’s tour of nineteenth century America, the country’s courtrooms have been places where the changes in American society show up quickly. These changes present brand new legal questions, such as: “What is privacy in the electronic age?” or “What do civil rights mean in the war on terror?”

F. Jury Reform

At the heart of American justice stands the right to a trial by jury. There is a national movement, based in the state courts, to improve the selection of jurors,

2. THE PEW COMMISSION ON CHILDREN IN FOSTER CARE, *FOSTERING THE FUTURE: SAFETY, WELL-BEING AND PERFORMANCE FOR CHILDREN IN FOSTER CARE* (2004), available at <http://pewfostercare.org/research/docs/FinalReport.pdf>.

3. See Barbara L. Jones, *National Foster-Care Summit is Held in Minnesota*, MINN. LAW., Oct. 3, 2005.

4. See Mike Dorning, *GOP Proposes Lobbying Restrictions; Tighter Rules Include Travel, Gifts but Are Vague on Other Issues*, CHI. TRIB., Jan. 18, 2006, at C8.

5. Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL’Y REV. 125 (2004).

to give jurors better tools to do their work, and to help them understand the laws they should apply.⁶

In thinking about how Indiana connects to these major national initiatives, I have come to a description that fits Indiana's position on the question of law reform, not just today, but through much of its history: Rarely first, occasionally last, and frequently early.

There are examples that demonstrate this description from our history and from modern times. In 2003, for example, we celebrated the 100th anniversary of Indiana's first juvenile court, the third juvenile court in America, way ahead of everybody.⁷ In the 1970s, Indiana was the third state whose legislature adopted determinant sentencing, the regime under which most of the country has now operated for about a quarter century.⁸ In the 1980s, Indiana was the second state to adopt standards for the qualifications and compensation of lawyers who represent defendants in capital cases.⁹ In the 1990s, we were the sixth or seventh state to launch a project on jury reform. Rarely first, occasionally last, frequently early.

II. INDIANA IS CONNECTED TO EVERY EFFORT AT COURT REFORM

So, what has Indiana been doing on the leading national priorities I described?

A. Globalization

Indiana courts have been front-line participants in devising lawyer rules to facilitate national and international commerce and were first to adopt the uniform rule admitting foreign lawyers to reside here and advise on the law of their home country.¹⁰ Indiana has sent judges and prosecutors overseas, to places such as Kosovo, Iraq, and Afghanistan, to assist in devising new constitutions, laws, and court rules. (And, since charity begins at home, we also sent people to the Gulf Coast to help rebuild courts and communities after Hurricane Katrina.) Indiana has likewise become a place foreign judges want to visit. During 2005 we hosted a delegation from Russia and one from Ukraine.

B. Families

Last year, the Indiana General Assembly passed legislation requiring the appointment of a guardian or child advocate in every case in which a child has

6. THE ARIZONA SUPREME COURT COMMITTEE ON THE MORE EFFECTIVE USE OF JURIES, THE POWER OF TWELVE (1994).

7. Frank Sullivan, Jr., *Indiana as a Forerunner in the Juvenile Court Movement*, 30 IND. L. REV. 279 (1997).

8. 1976 IND. ACTS 788-94.

9. IND. CRIM. R. 24(B)-(C) (1990).

10. IND. ADMIS. DISC. R. 5 (1994).

been abused or neglected.¹¹ In this respect, Indiana has been both last and first. We were the last state to enact this comprehensive requirement—but as far as building a corps of people to speak for the abused child in court, last year there were more than 2000 adult volunteers who worked with more than 16,000 Indiana children. Indiana has more local programs to recruit and train volunteers to represent the best interests of children than any other state.¹²

C. Ethics

The national re-examination of the ethics rules for judges I mentioned is being led by the American Bar Association (“ABA”). I have been invited to serve as a standing adviser to the ABA’s commission, but more importantly, the ABA has recruited two Hoosiers to do the heaviest intellectual lifting as reporters for the commission. They are Professor Charles Geyh of the law school at Bloomington and Professor Emeritus William Hodes of the law school at Indianapolis.¹³

A close corollary of ethics reform is working to make government more accessible, more “transparent,” as the current saying goes. Indiana has developed an award-winning project for public information and education about its courts.¹⁴ We work to expand public knowledge about the courts using a variety of different media, from printed materials to live lectures to public displays. And, of course, the Internet. On one day last September, more than 19,000 people visited our website.

D. Corrections and Problem-Solving

The best-known tool in judicial administration of drug offenses is the drug court. A drug court is not really a separate court but a court process under which the prosecutor and defense counsel can consent to permit a defendant to avoid prison on the condition that the defendant comply with a tight set of treatment requirements and extremely close monitoring directly by the judge. Approximately thirty-five percent of the people sent to drug courts would otherwise be holding down beds at the department of correction. The number of drug courts in Indiana is rising steadily, and new legislation in 2004 will strengthen and accelerate this movement.¹⁵ It is a movement whose national leadership has an Indiana cast. The executive director of the national organization for drug court professionals is former judge and Attorney General Karen Freeman-Wilson of Gary.

11. 2005 IND. ACTS 2150-56.

12. INDIANA STATE OFFICE OF GAL/CASA, 2003 STATISTICS REPORT 2 (2003).

13. Eileen C. Gallagher, *The ABA Revisits the Model Code of Judicial Conduct: A Report on Progress*, 44 A.B.A. JUDGES J. 7 (2005).

14. *Outstanding Achievements Recognized at Luncheon*, 49 RES GESTAE 10 (2006); CITICOR DIGITAL GOV'T, BEST OF BREED REPORT 15-16 (2002), available at <http://www.judiciary/citic/bob.pdf>.

15. 2004 IND. ACTS 2116-20.

Similar problem-solving techniques are applied in “re-entry courts.” As Corrections Commissioner J. David Donahue says, “We can’t expect much when we push an offender out the prison door with \$75 and a set of clothes.” Re-entry courts mean we can expect more. The nation’s leading re-entry court is in Fort Wayne, Indiana, under the leadership of Judge John Surbeck.¹⁶

E. New Age Law

On issues like privacy and consumer protection in the electronic age, any list of America’s top ten legal scholars would include Professor Fred Cate of Bloomington.¹⁷ Professor Cate is one of the jewels of Indiana’s legal community, and he helps the profession and the courts in a host of ways. These include advising our effort, under the leadership of Justice Brent Dickson, to devise new practices for improving public access to court records without making life easy for identity thieves or domestic abusers.¹⁸

F. Legal Help for the Poor

Many states have long used a system to gather otherwise uncollected interest from lawyer trust accounts as a way of helping people who need legal assistance. Indiana was the last state to implement such a system. But we were the first state to commit that resource to building a network of volunteer lawyers to assist low-income people. Last year Indiana attorneys contributed over 20,000 hours of time to indigent Hoosiers through this unique network.¹⁹

G. Jury Reform

You know that we have made many improvements in how Indiana juries do their work, but the newest one became effective just this January. At the end of 2005, we distributed to county clerks the best list of potential jurors ever devised. Justice Ted Boehm led an effort with assistance from the Bureau of Motor Vehicles, the Department of Revenue, Purdue University, and local court personnel that, in the end, produced a disc for each county containing non-duplicated, up-to-date names and addresses for use in mailing jury summons. We estimate that it includes ninety-nine percent of the people living in Indiana who are eligible for jury service.²⁰

16. See Editorial, *Reforming Juvenile Offenders*, FORT WAYNE J. GAZETTE, July 20, 2005, at 12A.

17. See, e.g., Fred H. Cate, *Past and Future Drivers of Privacy Law*, 828 P.L.I./PAT.11 (May-June 2005); Michael E. Staten & Fred H. Cate, *The Impact of Opt-In Privacy Rules on Retail Credit Markets: A Case Study of MBNA*, 52 DUKE L. J. 745 (2003).

18. See IND. ADMIN. R. 9.

19. Telephone Interview with Monica Fennell, Executive Director, Indiana Pro Bono Commission, in Indianapolis, Ind. (Feb. 9, 2006).

20. Editorial, *Jury Selection Now More Efficient, Fair*, BEDFORD TIMES-MAIL, Jan. 9, 2006, at A7; Theodore R. Boehm, *Teamwork Leads to Jury Pool Improvements*, INDIANAPOLIS STAR,

Why does that matter? For one thing, it will save a lot of money. In some counties, forty percent of the jury notices come back as undeliverable because the addresses are out of date.

There is a more important reason it matters. Americans treasure the idea that we are entitled to a “jury of our peers,” but the fact is that many jury lists leave out a lot of people, especially low-income people and minorities. This new initiative, a product of our Judicial Technology and Automation Committee, has produced the most inclusive list of possible jurors ever. The people summoned for jury duty now will be the most representative array of citizens in all the time since King John signed the Magna Carta in 1214. The country’s leading experts in jury reform made this Indiana development the lead story in their national electronic newsletter under the headline: “List Heaven.”²¹

III. INDIANA SUPPLIES LEADERS

Having listed some of the ways Indiana connects to the leading court issues of the day, I suggest that Indiana contributes to national reform in two ways: we provide leaders, and we export new ideas.

First, in a host of settings, Indiana provides leaders for the national judiciary and the legal profession.

I recently made a business call to a judge in Seattle named Eileen Kato; she was national chair of the American Bar Association Conference of Specialized Court Judges. Judge Kato said, “I know two of your colleagues.” She knew her successor as leader of this legion of judges: Judge Michael Witte of Lawrenceburg, Indiana. And she knew Frank Sullivan. “Justice Sullivan’s been our leader,” she said, “on a project to help more minority law school graduates get appellate court clerkships.”

Judge Lorenzo Arredondo of Lake County has been a director of the American Judicature Society, the country’s leading group on judicial selection and ethics. Judge John Baker of the Indiana Court of Appeals has served on the committee that devises education for appellate judges. Justice Sullivan now guides the ABA Appellate Judges Conference. Former Justice Myra Selby, now helping us on race and gender issues, earlier served on the body that accredits and therefore shapes America’s 180 law schools. It is an effort led for thirty years by Dean James P. White of the Indiana University School of Law.²²

Nov. 20, 2005, at 4E.

21. National Ctr. for State Court’s Jury Cmty. of Practice and Ctr. for Jury Studies, *List Heaven: Indiana’s Jury Pool Project*, JUR-E BULL., Oct. 28, 2005, available at http://www.ncsconline.org/WC/Publications/KIS_JurInnJurE10-28-05.pdf.

22. Dean White’s preeminence in this field is only partially illustrated by the volume of scholarly work he has published over the years concerning legal education. A brief sample of his work includes the following: James P. White, *Rededication to Our Court Values: Legal Education in the Public Interest*, 31 SW. U. L. REV. 159 (2002); James P. White, *Rethinking the Program of Legal Education: A New Program for the New Millennium*, 36 TULSA L.J. 397 (2000); James P. White, *Supreme Courts and Legal Education Reform*, 72 NOTRE DAME L. REV. 1155 (1997); James

Judges Margret Robb and Pat Riley of the Indiana Court of Appeals are recognized leaders in the National Association of Women Judges (and last year brought their annual meeting to Indianapolis). Judge Jim Payne, if he were not now part of the Daniels Administration, would instead be today president of the National Council of Juvenile and Family Court Judges. Don Lundberg, who runs the Indiana Supreme Court's Disciplinary Commission, is presently treasurer of the National Association of Bar Counsel, the country's organization of lawyer disciplinary agencies. And not far from the judicial circle, it is an honor for our state that the fifty state attorneys general have chosen Attorney General Steve Carter as their president.

Indiana's contribution of national leaders goes well beyond judges and lawyers. Cathy Springer, the director of education at the Indiana Judicial Center, has lately become a member of the faculty and a member of the oversight committee for the number one place in America where people work on how to improve the continuing legal education of judges, the University of Memphis.²³ Anne Davidson, assistant director of the Indiana Continuing Legal Education Commission, was recently president of the national association of organizations that oversee Continuing Legal Education ("CLE") for lawyers, a group called ORACLE. And, Cheri Harris of Indiana has recently become the executive director of ORACLE. (And indeed, we brought the offices of ORACLE here to Indiana.)

And the Judicial Family Institute, which helps spouses and children of judges navigate through judicial waters, was conceived and created by Justice Dickson's spouse, Jan Dickson, now widely regarded as having done more to help judicial families than any other single person in the country.²⁴

IV. INDIANA EXPORTS IDEAS

Second, and at least as important, Indiana is an exporter of ideas about better courts.

P. White, *Legal Education in the Era of Change: Law School Autonomy*, 1987 DUKE L.J. 292.

23. The University of Memphis's Center for the Study of Higher Education runs two complementary programs that serve directly the educational needs of judges. The Leadership Institute in Judicial Education ("LIJE") has, during its sixteen year existence, provided intensive and highly respected professional education to nearly 3500 judges, and other court staff from nearly every state in the Union. The Institute for Faculty Excellence in Judicial Education ("IFEJE") has, over the last nine years, provided training to judges and court staff that enhances their ability, in turn, to provide education to other judicial officers. Univ. of Memphis, Ctr. for the Study of Higher Educ., <http://coe.memphis.edu/CSHE> (last visited June 26, 2006).

24. The Judicial Family Institute is affiliated with the National Center of State Courts and is "dedicated to informing and offering support to judicial families confronting the unique challenges of public life." Judicial Family Institute, About JFI, <http://jfi.ncsconline.org/who.html> (last visited June 26, 2006). The institute provides judges, and their families, with support and access to numerous resources on topics ranging from questions regarding judicial ethics to concerns over quality of life. *Id.*

I will start with an example that even many judges in our state do not know about. There are two places in Indiana where we try most “mass tort” cases, litigation such as asbestos claims. They are presided over by Judge Jeff Dywan in Lake County and Judge Ken Johnson in Marion County. When I spoke to a recent conference at the University of Chicago, the first judge I ran into said, “How’s Ken Johnson? I wish we could use his system here in New Jersey.” Judge Johnson has developed a case management system for mass torts that is the envy of other judges elsewhere. Why does one need a special system for such cases? There was one four-week period when Judge Johnson received 300 cases with 15,000 claims.

Indiana’s pro bono plan, by which thousands of Hoosier lawyers volunteer their time to assist low-income people in need of legal assistance has been emulated by multiple states around the country. And several other states have taken our model on the Conference for Legal Education Opportunity (Indiana “CLEO”) to help more minority and other disadvantaged college students become lawyers.²⁵

On the problem of language, last year we certified the first interpreters qualified to translate formal courtroom testimony.²⁶ We also need people in the county courthouses who can on a day-to-day basis communicate with persons who walk into the courthouse speaking mostly Spanish. So, last fall we completed a pilot program in Terre Haute in partnership with Ivy Tech to train local court personnel in Spanish. We will soon launch it state-wide.²⁷

Most recent immigrants are people who speak Spanish, but individuals do appear in local courts speaking everything from Mandarin to Urdu. We are experimenting with a system designed for those situations called “Language Line,” and so far we have deployed it to assist with people who spoke French, Somalian, Russian, Mongolian, Yeman, and Mixteco (a Mexican regional dialect). Recently, for example, Judge James Jarrette in Kosciusko County had a litigant who spoke only Korean. He called our Division of State Court Administration and was quickly connected by telephone with a skilled interpreter who spoke Korean, so that people in the courtroom could understand her and she could understand them, and the court could resolve the case based on full

25. Indiana’s CLEO program is built upon the success of the national CLEO program. The program is authorized by IND. CODE §§ 33-24-13-1 to -7 (2005). Several other states, including Kentucky, Georgia, and Ohio, have either implemented similar programs, or begun the process of doing so. See National Ctr. for State Courts, Public Trust and Confidence Forum, http://www.ncsconline.org/projects_Initiatives/PTC/UnequalTreatment.htm (last visited June 26, 2006).

26. Press Release, Chief Justice Shepard to Swear in New Court Interpreters (Mar. 16, 2005), available at <http://www.in.gov/judiciary/press/2005/0316.html>. The court interpreter program involves a testing procedure in which individuals hoping to be certified as interpreters must pass rigorous oral and written exams. For more information on the program, see Indiana Supreme Court Division of State Court Administration, Court Interpreter Certification Program, <http://www.in.gov/judiciary/interpreter> (last visited June 26, 2006).

27. Press Release, Supreme Court and Ivy Tech Partner to Teach Spanish to Trial Court Employees (June 26, 2006), available at <http://www.in.gov/judiciary/press/2006/0626.html>.

communication by all.

Quite aside from structural reform, Indiana has been a giver of useful caselaw. When I became Chief Justice, I said, “We want to be a judiciary so well-regarded that judges and lawyers in other states, when considering the toughest legal issues of our time, will be led to look at each other and ask, ‘I wonder what Indiana has done about this.’”²⁸

Every few weeks, thousands of American lawyers receive the Supreme Court Reporter, the latest cases of the U.S. Supreme Court. The editors of this publication search the country for decisions from *other* courts that they think lawyers in America would want to know about, and they feature these as “Judicial Highlights.” In one six-month period last year, ten of those were Indiana cases—representing issues from the death penalty to criminal sentencing to family law and consumer protection.²⁹ It is a number far out of proportion to our state’s size and judicial output. This level of national recognition reflects the good job our appellate courts do, but it also reflects splendid work by Indiana lawyers and trial judges who skillfully litigate these cases long before the appeals reach this building.

V. THE PROSPECTS FOR MORE IMPROVEMENT

It has always seemed to me that our state’s bench ought to have its feet firmly planted on Indiana soil, but its eyes fixed on the horizon. It should be one that cares about individual cases, big and small. And always has in its heart what we can do together, tomorrow, to be better servants than we were yesterday.

That is more true in the Indiana judiciary now than it was eighteen months

28. This is an aspiration to which I return frequently for inspiration. As I noted in 2000, “It is the sort of heady statement one makes when taking office, a reminder of the lofty objectives that come with such a day.” Randall T. Shepard, Chief Justice of Indiana, State of the Judiciary Address: What Has Indiana Done About This? (Jan. 13, 2000) (on file with author). It is also an aspiration shared by a great many members of our judicial system, as the previous discussion, I hope, illustrates.

29. Among those cases recognized during this period were: *Smylie v. State*, 823 N.E.2d 679 (Ind.) (Shepard, C.J.) (holding *Blakely v. Washington* applicable to Indiana sentencing and appearing in Judicial Highlights on April 1, 2005), *cert. denied*, 126 S. Ct. 545 (2005); *Hyundai Motor America, Inc. v. Goodin*, 822 N.E.2d 947 (Ind. 2005) (Boehm, J.) (finding that an implied warranty of merchantability exists between manufacturer and buyer of automobile and appearing in Judicial Highlights on March 15, 2005); *Beckley v. Beckley*, 822 N.E.2d 158 (Ind. 2005) (Rucker, J.) (involving the division of marital property and appearing in Judicial Highlights on March 1, 2005); *Corcoran v. State*, 820 N.E.2d 655 (Ind.) (Sullivan, J.) (involving mental competence to waive post-conviction relief review in death penalty case and appearing in Judicial Highlights on February 1, 2005), *aff’d on reh’g*, 827 N.E.2d 542 (Ind. 2005). Recently, an opinion by Justice Dickson was also cited in Judicial Highlights. *Myers v. State*, 839 N.E.2d 1154 (Ind. 2005) (finding a warrantless dog sniff of student’s unoccupied car in high school parking lot conducted by school officials permissible and appearing in Judicial Highlights on January 15, 2005), *cert. denied*, 74 U.S.L.W. 3544 (Ind. May 22, 2006) (No. 05-1202).

ago, and Judge Diane Schneider of Lake County best articulated a central reason why. Speaking to a roomful of judges during the summer of 2005, she said: "A perpetual cloud hung over us year after year, a cloud labeled 'compensation.' That cloud finally has been lifted. This is a time when we should move ahead to better things."³⁰ She was confirming the response of the state's judges and prosecutors to the legislature's action in adjusting salaries during the 2005 session.³¹ This could not have happened without broad support in both houses and support from Governor Daniels. It will be in Indiana's best interest to make similar adjustments in the other two branches of government.

As for the judicial branch, I stand with Judge Schneider in believing that this is a moment when the judiciary must strive to do better than ever at helping Indiana be a safer, more prosperous, and more decent place to live.

30. Diane Schneider, Judge, Lake County, Remarks to the Indiana Graduate Program for Judges (June 9, 2005).

31. 2005 IND. ACTS 2351-53.

AN EXAMINATION OF THE INDIANA SUPREME COURT DOCKET, DISPOSITIONS, AND VOTING IN 2005*

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Like many appellate courts around the nation, the Indiana Supreme Court in 2005 continued to work through the implications of the new constitutional system for sentencing mandated by *Blakely v. Washington*.¹ *Blakely* in large part rewrote the manner in which the Sixth Amendment applies to sentencing decisions and called into question not only the sentencing statutes of many states, but hundreds of convictions that relied on those sentencing statutes. The Indiana Supreme Court plunged into these issues with full force in 2005. In all, the court addressed issues associated with *Blakely* in 22 opinions in 2005, which amounted to almost 20% of the Court's entire caseload. In fact, *Blakely* issues came up in almost a third of the criminal opinions handed down in 2005.

Many of the *Blakely* cases tracked a phenomenon first addressed in this Article last year. In 2004, the court issued a number of opinions that succinctly corrected discrete errors in the lower courts' opinions.² In lieu of a full discussion with the depth of analysis traditionally associated with the supreme court's opinions, these much narrower opinions focused like a laser on a single isolated issue in the case and chose to summarily affirm or not address the

* The Tables presented in this Article are patterned after the annual statistics of the U.S. Supreme Court published in the *Harvard Law Review*. An explanation of the origin of these Tables can be found at Louis Henkin, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 301 (1968). The *Harvard Law Review* granted permission for the use of these Tables by the *Indiana Law Review* this year; however, permission for any further reproduction of these Tables must be obtained from the *Harvard Law Review*.

We thank Barnes & Thornburg for its gracious willingness to devote the time, energy, and resources of its law firm to allow a project such as this to be accomplished. As is appropriate, credit for the idea for this project goes to Chief Justice Shepard. Many thanks to Kevin Betz, who initially developed this Article and worked hard to bring it to fruition in years past. The authors also must recognize Donald Glick (Mr. Stephenson's father-in-law) who spent Thanksgiving Day writing the spreadsheet that compiled the statistics.

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1. 542 U.S. 296 (2004).

2. See Mark J. Crandley & P. Jason Stephenson, *An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 2004*, 38 IND. L. REV. 867, 868-69 (2005).

remaining issues.³ Obviously, the myriad of sentencing reviews necessitated by *Blakely*—and the supreme court’s retroactive application of it⁴—make for an ideal circumstance for these error-correction opinions. In all, at least 11—precisely half—of the court’s *Blakely* opinions easily fall into the category of this type of abbreviated opinion.⁵

Despite the demands created by *Blakely*, the court did not allow that case to entirely dominate its docket in 2005. The court addressed important areas of law and handed down several landmark cases. The most memorable of these will likely be the court’s analysis in dealing with a proposed state constitutional right to abortion and a custody dispute between same-sex partners.⁶ However, as displayed by Table F, the court handed down a diverse series of cases in 2005. These cases ranged over 16 topics and included everything from 17 opinions addressing Indiana constitutional law issues to a surprising 8 opinions concerning real property law.

Moreover, the raw number of *Blakely* cases did not prevent the court from issuing 132 opinions, a spike from the 92 opinions handed down in 2004. In fact, the court’s 132 opinions was the highest raw number since the 190 opinions handed down in 2002, a year when the court was still addressing many direct criminal appeals under its old jurisdictional rules. Moreover, the increase marks the first time that the raw number of opinions has risen since that jurisdictional change. The number of opinions dropped every year between 2000 and 2004, as the court handed down 263, 211, 190, 108, and 92 opinions, respectively. Although the increase to 132 opinions certainly reflects the court’s efforts to sort through the issues created by *Blakely*, it also likely indicates that the court’s docket has stabilized in the wake of the jurisdictional change.

Interestingly, this spike in the raw number of opinions was not spread evenly over the justices. Chief Justice Shepard handed down 32 opinions, almost a quarter of the court’s opinions in all of 2005. This sizeable total was more than Justice Rucker and Justice Dickson combined and five more opinions than the second most prolific justice, which was Justice Sullivan at 27 opinions. The chief justice’s 32 opinions are the most he has handed down since his 42 in 2002. Again, *Blakely* offers a partial explanation. The chief justice authored exactly half of the court’s 22 opinions addressing *Blakely* issues. In fact, of the 16 *Blakely* opinions that were not handed down per curiam, the chief justice wrote all but 5.

3. *Id.*

4. *Smylie v. State*, 823 N.E.2d 679, 689 (Ind. 2005).

5. *Knighen v. State*, 839 N.E.2d 1166 (Ind. 2005); *Kincaid v. State*, 837 N.E.2d 1008 (Ind. 2005); *Lichti v. State*, 835 N.E.2d 478 (Ind. 2005); *Young v. State*, 834 N.E.2d 1015 (Ind. 2005); *Sowders v. State*, 829 N.E.2d 18 (Ind. 2005); *Nesbitt v. State*, 827 N.E.2d 33 (Ind. 2005); *Aguilar v. State*, 827 N.E.2d 31 (Ind. 2005); *Patrick v. State*, 827 N.E.2d 30 (Ind. 2005); *Estes v. State*, 827 N.E.2d 27 (Ind. 2005); *Heath v. State*, 826 N.E.2d 650 (Ind. 2005); *Laux v. State*, 821 N.E.2d 816 (Ind. 2005).

6. *See Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973 (Ind. 2005) (abortion); *King v. S.B.*, 837 N.E.2d 965 (Ind. 2005) (same-sex parenting issues).

Conversely, Justices Dickson and Rucker handed down only 17 and 13 opinions, respectively, in 2005. In fact, neither justice handed down as many opinions as the number of the court’s per curiam opinions, of which there were 19. As one would expect, many of these per curiam decisions also arose in the context of *Blakely*. In fact, every one of the court’s per curiam opinions in criminal cases dealt with sentencing issues created by *Blakely*.⁷

This difference between the number of opinions authored by the individual justices is explained at least in part by the continuing trend in split decisions among the justices. The justices were in complete agreement in only 64.3% of the opinions in 2005. This amount represents a drop from the 74.7% of unanimous opinions in 2004.

This lack of alignment almost certainly affected the raw number of opinions that Justices Dickson and Rucker handed down. Obviously, unless a justice is in the majority, the justice cannot author the majority opinion. In 2005, Justices Dickson and Rucker were often not in the majority. Justice Dickson had by far the largest number of dissenting opinions at 11. Similarly, Justice Rucker had the most concurring opinions at 7 and also drafted 8 dissents. In fact, Justice Rucker drafted more concurring and dissenting opinions (15) than majority opinions (13). Had either justice held the majority in these cases, the raw number of his opinions would radically change.

Indeed, even Justices Dickson and Rucker were themselves not aligned in many cases. No two judges were less aligned in 2005, as they agreed in only 74% of all cases. In the previous three years, they were or were among the most in agreement at 81.6%, 82.4%, and 88%.

Finally, despite all of these uncertainties, two truisms about the court continued to be accurate in 2005. First, it continued to be true that the court will almost always reverse the lower courts in cases where it has granted transfer. In the 45 opinions handed down after a grant of transfer in 2005, *only a single opinion* actually affirmed the result reached in the lower courts. Second, it continued to be true that transfer is exceedingly difficult to obtain. In 2005, the court granted transfer in only 12% of its cases. In criminal cases, this number dropped to 9.9%, while the court granted transfer in 15.9% of civil cases.

Table A. Chief Justice Shepard led the court in authoring criminal decisions with 27. Justice Sullivan was a distant second in this category with 15. Justice Rucker authored the least with 6. As for civil cases, Justice Boehm authored the most with 16, followed by Justice Sullivan with 12. Chief Justice Shepard authored the least with 5.

Table B-1. For civil cases, Chief Justice Shepard and Justice Sullivan were the two justices most aligned at 88.5%. This is a decrease in alignment from 2004, where the Chief Justice and Justice Boehm, as well as the Chief Justice and Justice Sullivan, were aligned more than 90% of the time. This year is more

7. *Lichti*, 835 N.E.2d 478; *Nesbitt*, 827 N.E.2d 33; *Aguilar*, 827 N.E.2d 31; *Patrick*, 827 N.E.2d 30; *Estes*, 827 N.E.2d 27; *Laux*, 821 N.E.2d 816.

similar to 2003 and 2002, when no two justices agreed in more than 90% of the civil cases.

Conversely, Justices Rucker and Dickson and Chief Justice Shepard and Justice Dickson were least aligned with 75.5%. By contrast, the two justices least aligned in civil cases in 2004 were Justices Sullivan and Dickson, who were aligned in 81.8% of the cases.

Table B-2. Chief Justice Shepard and Justice Dickson, as well as Chief Justice Shepard and Justice Sullivan, were the most aligned in criminal cases, as they were in agreement in 88.6% of those cases. Justice Dickson and Justice Rucker were in agreement in only 72.9% of the court's criminal cases, the lowest of any two justices.

Table B-3. For all cases, Justice Sullivan and Chief Justice Shepard were aligned 88.5% of the time, the most of any justices. Justice Rucker agreed with Justice Dickson in 74% of all cases, which was the least. The same was true in 2004 and 2003, as in each of those years Justice Rucker agreed with Justice Sullivan (and Chief Justice Shepard) less than any other pairing of justices.

Overall, Justice Boehm was the most aligned with his fellow justices, and Justice Dickson was the least aligned.

Table C. The percentage of unanimous opinions decreased in 2005. In all, 64.3% of the court's opinions were unanimous, compared to 72.5% in 2004 and 66.1% in 2003. The percentage of cases with at least one dissent rose sharply. In 2005, 26.2% of all cases drew at least one dissent. In 2004, 2003, 2002, and 2001, the percentage of cases with at least one dissent was 15.4%, 27.8%, 23.2%, and 18.5%, respectively.

Table D. Both the raw number and percentage of 3-2 decisions rose in 2005. The court issued 21 3-2 decisions in 2005. In 2004, 2003, 2002, and 2001, the court handed down 10, 18, 26, and 27 split decisions.

In a departure from previous years, Justice Boehm was the pivotal justice, being in the majority 13 times. This is a departure from previous years, when Chief Justice Shepard held this role. Justice Sullivan and Chief Justice Shepard's votes were also pivotal in recent 3-2 cases. In 2005, they each were in the majority 12 times.

Table E-1. Overall, the court affirmed cases only 21.1% of the time. Civil transfer appeals were affirmed only 2.8% of the time and nonmandatory criminal appeals were affirmed 35.2% of the time.

Table E-2. In 2005, the court continued its trend of granting fewer petitions for transfer in civil cases. The court granted transfer in 15.9% of the civil cases. This is a decrease from 2004, 2003, and 2002, where the court granted transfer 16.4%, 21.2%, and 23.4% of the time, respectively.

The percentage of transfer petitions granted in criminal cases rose from previous years. In 2004, the court granted 9.9% of all petitions to transfer in

criminal cases. In 2004, 2003, 2002, and 2001, the court granted 7.7%, 9.8%, 7.5%, and 6.6% of transfer petitions in criminal cases, respectively.

Table F. The court continued to hear a diverse spectrum of cases in 2005.

As previously mentioned, sentencing issues dominated the docket with 22 opinions related to Blakely. These are reflected in the table both in the criminal and Indiana Constitution sections. In keeping with the docket change since the Indiana Constitution’s amendment, the court also focused significantly on various civil issues, including an emphasis on administrative law and real property cases. The court also clarified family law issues, doubling the number of opinions from the prior year on this topic.

TABLE A
OPINIONS^a

	OPINIONS OF COURT ^b			CONCURRENCES ^c			DISSENTS ^d		
	Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total
Shepard, C.J.	27	5	32	1	2	3	2	3	5
Dickson, J. ^e	8	9	17	2	1	3	4	7	11
Sullivan, J. ^e	15	12	27	1	0	1	3	6	9
Boehm, J. ^e	8	16	24	2	1	3	3	4	7
Rucker, J.	6	7	13	5	2	7	6	2	8
Per Curiam	6	13	19						
Total	70	62	132	11	6	17	18	22	40

^a These are opinions and votes on opinions by each justice and in per curiam in the 2005 term. The Indiana Supreme Court is unique because it is the only supreme court to assign each case to a justice by a consensus method. Cases are distributed by a consensus of the justices in the majority on each case either by volunteering or nominating writers. The chief justice does not have any power to control the assignments other than as a member of the majority. *See* Melinda Gann Hall, *Opinion Assignment Procedures and Conference Practices in State Supreme Courts*, 73 JUDICATURE 209 (1990). The order of discussion and voting is started by the most junior member of the court and follows reverse seniority. *See id.* at 210.

^b This is only a counting of full opinions written by each justice. Plurality opinions that announce the judgment of the court are counted as opinions of the court. It includes opinions on civil, criminal, and original actions.

^c This category includes both written concurrences, joining in written concurrence, and votes to concur in result only.

^d This category includes both written dissents and votes to dissent without opinion. Opinions concurring in part and dissenting in part or opinions concurring in part only and differing on another issue are counted as dissents.

^e Justices declined to participate in the following cases: *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143 (Ind. 2005) (Sullivan, J.); *Associated Med. Networks, Ltd. v. Lewis*, 824 N.E.2d 679 (Ind. 2005) (Boehm, J.).

TABLE B-1
VOTING ALIGNMENTS FOR CIVIL CASES^f

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		40	45	44	41
	S		0	1	0	1
	D	---	40	46	44	41
	N		53	52	52	53
	P		75.5%	88.5%	84.6%	77.4%
Dickson, J.	O	40		40	42	39
	S	0		0	1	1
	D	40	---	40	43	40
	N	53		52	52	53
	P	75.5%		76.9%	82.7%	75.5%
Sullivan, J.	O	45	40		43	41
	S	1	0		0	1
	D	46	40	---	43	42
	N	52	52		51	52
	P	88.5%	76.9%		84.3%	80.8%
Boehm, J.	O	44	42	43		43
	S	0	1	0		2
	D	44	43	43	---	45
	N	52	52	51		52
	P	84.6%	82.7%	84.3%		86.5%
Rucker, J.	O	41	39	41	43	
	S	1	1	1	2	
	D	41	40	42	45	---
	N	53	53	52	52	
	P	77.4%	75.5%	80.8%	86.5%	

^f This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only civil cases. For example, in the top set of numbers for Chief Justice Shepard, 40 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a civil case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE B-2
VOTING ALIGNMENTS FOR CRIMINAL CASES^g

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		62	62	61	55
	S		0	0	0	0
	D	---	62	62	61	55
	N		70	70	70	70
	P		88.6%	88.6%	87.1%	78.6%
Dickson, J.	O	62		58	58	51
	S	0		0	1	0
	D	62	---	58	59	51
	N	70		70	70	70
	P	88.6%		82.9%	84.3%	72.9%
Sullivan, J.	O	62	58		60	55
	S	0	0		0	0
	D	62	58	---	60	55
	N	70	70		70	70
	P	88.6%	82.9%		85.7%	82.6%
Boehm, J.	O	61	58	60		53
	S	0	1	0		1
	D	61	59	60	---	54
	N	70	70	70		70
	P	87.1%	84.3%	85.7%		77.1%
Rucker, J.	O	55	51	55	53	
	S	0	0	0	1	
	D	55	51	55	54	---
	N	70	70	70	70	
	P	78.6%	72.9%	78.6%	77.1%	

^g This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only criminal cases. For example, in the top set of numbers for Chief Justice Shepard, 62 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a criminal case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE B-3
VOTING ALIGNMENTS FOR ALL CASES^h

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		102	107	105	96
	S		0	1	0	1
	D	---	102	108	105	97
	N		123	122	122	123
	P		82.9%	88.5%	86.1 %	78.9 %
Dickson, J.	O	102		98	100	90
	S	0		0	2	1
	D	102	---	98	102	91
	N	123		122	122	123
	P	82.9 %		80.3%	83.6 %	74.0 %
Sullivan, J.	O	107	98		103	96
	S	1	0		0	1
	D	108	98	---	103	97
	N	122	122		121	122
	P	88.5 %	80.3 %		85.1 %	79.5 %
Boehm, J.	O	105	100	103		96
	S	0	2	0		3
	D	105	102	103	---	99
	N	122	122	121		122
	P	86.1%	83.6 %	85.1%		81.1 %
Rucker, J.	O	96	90	96	96	
	S	1	1	1	3	
	D	97	91	97	99	--
	N	123	123	122	122	
	P	78.9%	74.0%	79.5 %	81.1%	

^h This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for all cases. For example, in the top set of numbers for Chief Justice Shepard, 102 is the total number of times Chief Justice Shepard and Justice Dickson agreed in all full majority opinions written by the court in 2005. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE C
UNANIMITY
NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASESⁱ

Unanimous ^j			Unanimous with Concurrence ^k			Opinions with Dissent			Total
Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total	
48	33	81 (64.3%)	8	4	12 (9.5%)	14	19	33 (26.2%)	126

ⁱ This Table tracks the number and percent of unanimous opinions among all opinions written. If, for example, only four justices participate and all concur, it is still considered unanimous. It also tracks the percentage of overall opinions with concurrence and overall opinions with dissent.

^j A decision is considered unanimous only when all justices participating in the case voted to concur in the court’s opinion as well as its judgment. When one or more justices concurred in the result but not in the opinion, the case is not considered unanimous.

^k A decision is listed in this column if one or more justices concurred in the result but not in the opinion of the court or wrote a concurrence, and there were no dissents.

TABLE D
3-2 DECISIONS¹

Justices Constituting the Majority	Number of Opinions ^m
1. Shepard, C.J., Sullivan, J., Boehm, J.	3
2. Shepard, C.J., Dickson, J., Sullivan, J.	3
3. Shepard, C.J., Rucker, J., Sullivan, J.	3
4. Shepard, C.J., Dickson, J., Boehm, J.	2
5. Shepard, C.J., Boehm, J., Rucker, J.	1
6. Dickson, J., Sullivan, J., Rucker, J.	1
7. Dickson, J., Boehm, J., Rucker, J.	2
8. Sullivan, J., Boehm, J., Rucker, J.	2
9. Dickson, J., Boehm, J.	1
10. Sullivan, J., Boehm, J.	2
11. Sullivan, J., Rucker, J.	1
Total ⁿ	21

¹ This Table concerns only decisions rendered by full opinion. An opinion is counted as a 3-2 decision if two justices voted to decide the case in a manner different from that of the majority of the court.

^m This column lists the number of times each three-justice group constituted the majority in a 3-2 decision.

ⁿ The 2005 term’s 3-2 decisions were:

1. Shepard, C.J., Sullivan, J., Boehm, J.: Ind. Dep’t of Env’tl. Mgmt. v. West, 838 N.E.2d 408 (Ind. 2005) (Sullivan, J.); New Welton Homes. v. Eckman, 830 N.E.2d 32 (Ind. 2005) (Shepard, C.J.); PSI Energy, Inc. v. Roberts, 829 N.E.2d 943 (Ind. 2005) (Boehm, J.).
2. Shepard, C.J., Dickson, J., Sullivan, J.: Baird v. State, 833 N.E.2d 28 (Ind. 2005) (Shepard, C.J.); Blanck v. Ind. Dep’t of Corr., 829 N.E.2d 505 (Ind. 2005) (Sullivan, J.); Lambert v. State, 825 N.E.2d 1261 (Ind. 2005) (Shepard, C.J.).
3. Shepard, C.J., Rucker, J., Sullivan, J.: Fackler v. Powell, 839 N.E.2d 165 (Ind. 2005) (Sullivan, J.); Clinic for Women, Inc. v. Brizzi, 837 N.E.2d 973 (Ind. 2005) (Rucker, J.); Cotto v. State, 829 N.E.2d 520 (Ind. 2005) (Rucker, J.).
4. Shepard, C.J., Dickson, J., Boehm, J.: Myers v. State, 839 N.E.2d 1146 (Ind. 2005) (Dickson, J.); Fraley v. Minger, 829 N.E.2d 476 (Ind. 2005) (Dickson, J.).
5. Shepard, C.J., Boehm, J., Rucker, J.: Crabtree *ex rel.* Kemp v. Estate of Crabtree, 837 N.E.2d 135 (Ind. 2005) (Boehm, J.).
6. Dickson, J., Sullivan, J., Rucker, J.: Sees v. Bank One Ind., N.A., 839 N.E.2d 154 (Ind. 2005) (Rucker, J.).
7. Dickson, J., Boehm, J., Rucker, J.: Booth v. Wiley, 839 N.E.2d 1168 (Ind. 2005) (Dickson, J.); Tippecanoe Assoc. II v. Kimco Lafayette 671, Inc., 829 N.E.2d 512 (Ind. 2005) (Boehm, J.).
8. Sullivan, J., Boehm, J., Rucker, J.: King v. S.B., 837 N.E.2d 965 (Ind. 2005) (Sullivan, J.); Halsema v. State, 823 N.E.2d 668 (Ind. 2005) (Rucker, J.).
9. Dickson, J., Boehm, J.: State *ex rel.* Att’y Gen. v. Lake Superior Court, 820 N.E.2d 1240 (Ind. 2005) (Boehm, J.).
10. Sullivan, J., Boehm, J.: Pruitt v. State, 834 N.E.2d 90 (Ind. 2005) (Boehm, J.); Houser v. State, 823 N.E.2d 693 (Ind. 2005) (Sullivan, J.).
11. Sullivan, J., Rucker, J.: Haltom v. State, 832 N.E.2d 969 (Ind. 2005) (Sullivan, J.).

TABLE E-1
DISPOSITION OF CASES REVIEWED BY TRANSFER
AND DIRECT APPEALS^o

	Reversed or Vacated ^p	Affirmed	Total
Civil Appeals Accepted for Transfer	44 (97.8%)	1 (2.8%)	45
Direct Civil Appeals	3 (75%)	1 (25%)	4
Criminal Appeals Accepted for Transfer	35 (64.8%)	19 (35.2%)	54
Direct Criminal Appeals	4 (66.7%)	2 (33.3%)	6
Total	86 (78.9%)	23 (21.1%)	109 ^q

^o Direct criminal appeals are cases in which the trial court imposed a death sentence. *See* IND. CONST. art. VII, § 4. Thus, direct criminal appeals are those directly from the trial court. A civil appeal may also be direct from the trial court. *See* IND. APP. R. 56, 63 (pursuant to Rules of Procedure for Original Actions). All other Indiana Supreme Court opinions are accepted for transfer from the Indiana Court of Appeals. *See* IND. APP. R. 57.

^p Generally, the term “vacate” is used by the Indiana Supreme Court when it is reviewing a court of appeals opinion, and the term “reverse” is used when the court overrules a trial court decision. A point to consider in reviewing this Table is that the court technically “vacates” every court of appeals opinion that is accepted for transfer, but may only disagree with a small portion of the reasoning and still agree with the result. *See* IND. APP. R. 58(A). As a practical matter, “reverse” or “vacate” simply represents any action by the court that does not affirm the trial court or court of appeals opinion.

^q This does not include 6 attorney discipline opinions, 3 judicial discipline opinions, or 1 opinion related to certified questions. These opinions did not reverse, vacate, or affirm any other court’s decision. This also does not include 10 opinions which considered petitions for post conviction relief.

TABLE E-2
DISPOSITION OF PETITIONS TO TRANSFER
TO SUPREME COURT IN 2005^r

	Denied or Dismissed	Granted	Total
Petitions to Transfer			
Civil ^s	260 (84.1%)	49 (15.9%)	309
Criminal ^t	502 (90.1%)	55 (9.9%)	557
Juvenile	36 (87.8%)	5 (12.2%)	41
Total	798 (88.0%)	109 (12.0%)	907

^r This Table analyzes the disposition of petitions to transfer by the court. *See* IND. APP. R. 58(A).
^s This also includes petitions to transfer in tax cases and workers' compensation cases.
^t This also includes petitions to transfer in post-conviction relief cases.

TABLE F
SUBJECT AREAS OF SELECTED DISPOSITIONS
WITH FULL OPINIONS^u

Original Actions	Number
• Certified Questions	1 ^v
• Writs of Mandamus or Prohibition	1 ^w
• Attorney Discipline	6 ^x
• Judicial Discipline	3 ^y
Criminal	
• Death Penalty	9 ^z
• Fourth Amendment or Search and Seizure	5 ^{aa}
• Writ of Habeas Corpus	0
Emergency Appeals to the Supreme Court	0
Trusts, Estates, or Probate	0
Real Estate or Real Property	8 ^{bb}
Personal Property	2 ^{cc}
Landlord-Tenant	0
Divorce or Child Support	4 ^{dd}
Children in Need of Services (CHINS)	0
Paternity	0
Product Liability or Strict Liability	3 ^{ee}
Negligence or Personal Injury	4 ^{ff}
Invasion of Privacy	0
Medical Malpractice	3 ^{gg}
Indiana Tort Claims Act	0
Statute of Limitations or Statute of Repose	0
Tax, Department of State Revenue, or State Board of Tax Commissioners	4 ^{hh}
Contracts	5 ⁱⁱ
Corporate Law or the Indiana Business Corporation Law	0
Uniform Commercial Code	0
Banking Law	0
Employment Law	4 ^{jj}
Insurance Law	1 ^{kk}
Environmental Law	0
Consumer Law	2 ^{ll}
Workers' Compensation	1 ^{mm}
Arbitration	0
Administrative Law	6 ⁿⁿ
First Amendment, Open Door Law, or Public Records Law	0
Full Faith and Credit	0
Eleventh Amendment	0
Civil Rights	0
Indiana Constitution	17 ^{oo}

^u This Table is designed to provide a general idea of the specific subject areas upon which the court ruled or discussed and how many times it did so in 2005. It is also a quick-reference guide to court rulings for practitioners in specific areas of the law. The numbers corresponding to the areas of law reflect the number of cases in which the court substantively discussed legal issues about these subject areas. Also, any attorney discipline case resolved by order (as opposed to an opinion) was not considered in preparing this Table.

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- ^v Gribben v. Wal-Mart Stores, Inc., 824 N.E.2d 349 (Ind. 2005).
- ^w State *ex rel.* Bramley v. Tipton Circuit Court, 835 N.E.2d 479 (Ind. 2005).
- ^x *In re* Thomsen, 837 N.E.2d 1011 (Ind. 2005); *In re* Freeman, 835 N.E.2d 494 (Ind. 2005); *In re* Clark, 834 N.E.2d 653 (Ind. 2005); *In re* Winkler, 834 N.E.2d 85 (Ind. 2005); *In re* Hughes, 833 N.E.2d 459 (Ind. 2005); *In re* Ryan, 824 N.E.2d 687 (Ind. 2005).
- ^y *In re* Pfaff, 838 N.E.2d 1022 (Ind. 2005); *In re* Danikolas, 838 N.E.2d 422 (Ind. 2005); *In re* Pfaff, 837 N.E.2d 497 (Ind. 2005).
- ^z Pruitt v. State, 834 N.E.2d 90 (Ind. 2005); Conner v. State, 829 N.E.2d 21 (Ind. 2005); Johnson v. State, 827 N.E.2d 547 (Ind. 2005); Corcoran v. State, 827 N.E.2d 542 (Ind. 2005); State v. Barker, 826 N.E.2d 648 (Ind. 2005); Lambert v. State, 825 N.E.2d 1261 (Ind. 2005); Wallace v. State, 820 N.E.2d 1261 (Ind. 2005); Corcoran v. State, 820 N.E.2d 655 (Ind. 2005); Holmes v. State, 820 N.E.2d 136 (Ind. 2005).
- ^{aa} Myers v. State, 839 N.E.2d 1146 (Ind. 2005); Litchfield v. State, 824 N.E.2d 356 (Ind. 2005); Halsema v. State, 823 N.E.2d 668 (Ind. 2005); Guy v. State, 823 N.E.2d 274 (Ind. 2005).
- ^{bb} Wilfong v. Cessna Corp., 838 N.E.2d 403 (Ind. 2005); Metro. Dev. Comm'n of Marion County v. Pinnacle Media, 836 N.E.2d 422 (Ind. 2005); Burd Mgmt. v. State, 831 N.E.2d 104 (Ind. 2005); PSI Energy, Inc. v. Roberts, 829 N.E.2d 943 (Ind. 2005); Tippecanoe Assoc. II v. Kimco Lafayette 671, Inc., 829 N.E.2d 512 (Ind. 2005); Fraley v. Minger, 829 N.E.2d 476 (Ind. 2005); Bank of New York v. Nally, 820 N.E.2d 644 (Ind. 2005); Borsuk v. Town of St. John, 820 N.E.2d 118 (Ind. 2005).
- ^{cc} Kocher v. Getz, 824 N.E.2d 671 (Ind. 2005); Beckley v. Beckley, 822 N.E.2d 158 (Ind. 2005).
- ^{dd} Severs v. Severs, 837 N.E.2d 498 (Ind. 2005); MacLafferty v. MacLafferty, 829 N.E.2d 938 (Ind. 2005); Haville v. Haville, 825 N.E.2d 375 (Ind. 2005); Beckley v. Beckley, 822 N.E.2d 158 (Ind. 2005).
- ^{ee} Crabtree *ex rel.* v. Estate of Crabtree, 837 N.E.2d 135 (Ind. 2005); Sumbry v. Boklund, 836 N.E.2d 430 (Ind. 2005); Gunkel v. Renovations, Inc., 822 N.E.2d 150 (Ind. 2005).
- ^{ff} Crabtree *ex rel.* v. Estate of Crabtree, 837 N.E.2d 135 (Ind. 2005); Sumbry v. Boklund, 836 N.E.2d 430 (Ind. 2005); Kocher v. Getz, 824 N.E.2d 671 (Ind. 2005); Witte v. Mundy *ex rel.* Mundy, 820 N.E.2d 128 (Ind. 2005).
- ^{gg} Booth v. Wiley, 839 N.E.2d 1168 (Ind. 2005); Cox v. Paul, 828 N.E.2d 907 (Ind. 2005); Chamberlain v. Walpole, 822 N.E.2d 959 (Ind. 2005).
- ^{hh} State *ex rel.* Att'y Gen. v. Lake Superior Court, 820 N.E.2d 1240 (Ind. 2005); Lake County Prop. Tax Assessment Bd. of Appeals v. U.S. Steel Corp., 820 N.E.2d 1237 (Ind. 2005); Lake County Prop. Tax Assessment Bd. of Appeals v. BP Amoco Corp., 820 N.E.2d 1231 (Ind. 2005); Dep't of Local Gov't Fin. v. Commonwealth Edison Co. of Ind., 820 N.E.2d 1222 (Ind. 2005).
- ⁱⁱ Dunn v. Meridian Mut. Ins. Co., 836 N.E.2d 249 (Ind. 2005); Allgood v. Meridian Sec. Ins. Co., 836 N.E.2d 243 (Ind. 2005); New Welton Homes v. Eckman, 830 N.E.2d 32 (Ind. 2005); Hyundai Motor Am., Inc. v. Goodin, 822 N.E.2d 947 (Ind. 2005); Bank of New York v. Nally, 820 N.E.2d 644 (Ind. 2005).
- ^{jj} Ind. Dep't of Env'tl. Mgmt. v. West, 838 N.E.2d 408 (Ind. 2005); Prentoski v. Five Star Painting, Inc., 837 N.E.2d 972 (Ind. 2005).
- ^{kk} Dunn v. Meridian Mut. Ins. Co., 836 N.E.2d 249 (Ind. 2005); Allgood v. Meridian Sec. Ins. Co., 836 N.E.2d 243 (Ind. 2005); Monroe Guar. Ins. Co. v. Magwerks Corp., 829 N.E.2d 968 (Ind. 2005); Associated Med. Networks, Ltd. v. Lewis, 824 N.E.2d 679 (Ind. 2005).
- ^{ll} New Welton Homes v. Eckman, 830 N.E.2d 32 (Ind. 2005); Hyundai Motor Am., Inc. v. Goodin, 822 N.E.2d 947 (Ind. 2005).
- ^{mmm} Dial X-Automated Equip. v. Caskey, 826 N.E.2d 642 (Ind. 2005).

ⁿⁿ Bd. of Dirs. of the Bass Lake Conservancy Dist. v. Brewer, 839 N.E.2d 699 (Ind. 2005); Ind. Ass'n of Beverage Retailers v. Ind. Alcohol & Tobacco Comm'n, 836 N.E.2d 255 (Ind. 2005); Roger v. Celebration Fireworks, Inc., 829 N.E.2d 979 (Ind. 2005); Advantage Home Health Care, Inc. v. Ind. State Dep't of Health., 829 N.E.2d 499 (Ind. 2005); Louisville & Ind. R.R. Co. v. Ind. Gas Co., 829 N.E.2d 7 (Ind. 2005); Dial X-Automated Equip. v. Caskey, 826 N.E.2d 642 (Ind. 2005).

^{oo} Clinic for Women v. Brizzi, 837 N.E.2d 973 (Ind. 2005); King v. S.B., 837 N.E.2d 965 (Ind. 2005); SMDFund, Inc. v. Fort Wayne-Allen County Airport Auth., 831 N.E.2d 725 (Ind. 2005); Cotto v. State, 829 N.E.2d 520 (Ind. 2005); Blanck v. Ind. Dep't of Corr., 829 N.E.2d 505 (Ind. 2005); Williams v. State, 827 N.E.2d 1127 (Ind. 2005); Johnson v. State, 827 N.E.2d 547 (Ind. 2005); Corcoran v. State, 827 N.E.2d 542 (Ind. 2005); Estes v. State, 827 N.E.2d 27 (Ind. 2005); State v. Barker, 826 N.E.2d 648 (Ind. 2005); Neale v. State, 826 N.E.2d 635 (Ind. 2005); Smith v. State, 825 N.E.2d 783 (Ind. 2005); Litchfield v. State, 824 N.E.2d 356 (Ind. 2005); Graves v. State, 823 N.E.2d 1193 (Ind. 2005); Houser v. State, 823 N.E.2d 693 (Ind. 2005); Debro v. State, 821 N.E.2d 367 (Ind. 2005); State *ex rel.* Att'y Gen. v. Lake Superior Court, 820 N.E.2d 1240 (Ind. 2005).

SURVEY OF ADMINISTRATIVE LAW

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INTRODUCTION

Administrative law in Indiana is based upon the actions of numerous state and local agencies. This survey Article focuses on the statutory framework that covers many of these agencies: the Administrative Orders and Procedures Act (“AOPA”);¹ the Administrative Rules and Procedures Act (“ARPA”);² and the Open Door and Records Laws,³ as well as common law standards that govern other regulatory agencies.

I. JUDICIAL REVIEW

AOPA applies to many, but not all, administrative agencies in Indiana. Indiana Code section 4-21.5-2-4 exempts several administrative agencies from AOPA, including the Utility Regulatory Commission (“IURC”), State Department of Revenue, and the Department of Workforce Development.⁴ Therefore, there can be different standards of review for different agencies.

A. *Standard of Review*

The appropriate standard of review for the agency is frequently well settled law, being either prescribed by statute or long-standing case law. However, there were several cases during the review period which are notable for the application of these standards.

1. *Standard of Review Under AOPA.*—*Kinnaird v. Secretary, Indiana Family and Social Services Administration*⁵ discussed the standard of review under AOPA.

[A] court may provide relief only if the agency action is:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.⁶

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1. IND. CODE §§ 4-21.5-1 to -7-9 (2005).

2. *Id.* §§ 4-22-1 to -9-7.

3. *Id.* §§ 5-14-1.5, -3.

4. *Id.* § 4-21.5-4.4.

5. 817 N.E.2d 1274 (Ind. Ct. App. 2004), *reh’g denied* (Ind. Ct. App.), and *trans. denied*, 831 N.E.2d 748 (Ind. 2005).

6. *Id.* at 1277 (citing IND. CODE § 4-21.5-5-14; *Equicor Dev., Inc. v. Westfield-Washington Twp. Plan Comm’n*, 758 N.E.2d 34, 36-37 (Ind. 2001)); *see also* *Indiana-Kentucky Elec. Corp. v. Comm’r, Ind. Dep’t of Env’tl. Mgmt.*, 820 N.E.2d 771, 776 (Ind. Ct. App. 2005).

“In reviewing an administrative decision, a court is not to try the facts de novo or substitute its own judgment for that of the agency.”⁷ The court also commented on the amount of deference which should be given to the trial court. Issues of law are reviewed de novo.⁸ “If the [agency] holds an evidentiary hearing, [the] Court defers to the trial court to the extent its factual findings derive from the hearing.”⁹ However, review is also de novo if the findings turn solely on a paper record.¹⁰

Kinnaird appealed a decision from the Indiana Family and Social Services Administration (“IFSSA”) terminating his Section 8 Housing Assistance for failure to notify the agency when he was away from his apartment “for an extended period of time,” which was required by the local housing agency’s policies.¹¹ Kinnaird was absent because he was incarcerated for 130 days for failure to pay child support.¹² “During his incarceration, Kinnaird paid the rent on his apartment and he returned to that apartment upon his release.”¹³

On appeal, Kinnaird claimed that the “extended period of time” requirement was vague and “that the trial court gave too much deference to the IFSSA’s decision.”¹⁴ The court of appeals found that de novo was the proper standard of review to the extent the issue was an issue of law and because the trial court did not conduct an evidentiary hearing.¹⁵

The Indiana Court of Appeals did not reach the question of whether the extended period of time regulation was vague, because it determined that “a 130 day absence constitute[d] an extended period of time under any reasonable interpretation of the Housing Agency’s policy.”¹⁶ Although the court discussed well established administrative law with regard to the requirement that “[a]dministrative decisions must be based upon ascertainable standards to ensure that agency action will be orderly and consistent[,]” the basis for the court’s

7. *Kinnaird*, 817 N.E.2d at 1277-78 (quoting *Equicor*, 758 N.E.2d at 37).

8. *Id.* at 1278.

9. *Id.* (quoting *Equicor*, 758 N.E.2d at 37).

10. *Id.*

11. *Id.* at 1275.

12. *Id.* at 1276.

13. *Id.* at 1275.

14. *Id.* at 1277. The case illustrates how lengthy the administrative review process can be. Kinnaird’s case began when the Jasper County Housing Agency terminated his Section 8 Housing Assistance. Kinnaird first challenged the local housing agency’s decision by requesting a hearing with an Administrative Law Judge (“ALJ”). *Id.* at 1275-76. The ALJ found in Kinnaird’s favor. However, the IFSSA reversed the ALJ’s decision on appeal by the local housing agency. *Id.* at 1277. Kinnaird sought judicial review, and the Jasper County court affirmed the IFSSA’s final action, which Kinnaird appealed to the Indiana Court of Appeals. *Id.*

15. *Id.* at 1278. The trial court “based its decision on the parties’ briefs and oral arguments.” *Id.*

16. *Id.* at 1279.

decision did not rely upon these grounds.¹⁷

Indiana Department of Natural Resources v. Hoosier Environmental Council, Inc.,¹⁸ presents a different result. In this case, the Indiana Court of Appeals determined that the reviewing trial court erred in substituting its judgment for that of the administrative agency.¹⁹

In discussing the principles of administrative law, the court commented that “agency principles are founded in the constitutional doctrine of separation of powers[.]”²⁰

As part of the judicial branch, a court has no authority to usurp or exercise the functions of an administrative agency during judicial review of the agency’s order. A court may not substitute its judgment on the merits of an issue for that of an administrative body acting within its jurisdiction. The purpose of judicial review of an administrative order is “solely to determine whether or not the body was outside the limits and jurisdiction of such body. Once the matter of jurisdiction is determined the court has no further right to interfere with an administrative procedure which belongs to another department of the government—not the judiciary.”²¹

The Indiana Court of Appeals remanded the matter to the administrative agency to conduct further proceedings.²² The court also indicated that it would give “deference to the interpretation of a statute by the administrative agency that is charged with its enforcement in light of its expertise in its given area.”²³

Finally, in *Indiana-Kentucky Electric Corp. v. Commissioner, Indiana Department of Environmental Management*,²⁴ the Indiana Court of Appeals found that lower reviewing courts must also use a de novo standard of review with regard to issues of statutory interpretation.²⁵ Referencing Indiana Code section 4-21.5-3-27(a) and (b), the court found that an ALJ serves as the trier of fact in

17. *Id.* at 1278 (quoting *Taylor v. Ind. Family & Soc. Servs. Admin.*, 699 N.E.2d 1186, 1192 (Ind. Ct. App. 1998)). “The test to be applied in determining whether an administrative agency regulation can withstand a challenge for vagueness is whether it is so indefinite that persons of common intelligence must necessarily guess at its meaning and differ as to its application.” *Id.* (quoting *Taylor*, 699 N.E.2d at 1192).

18. 831 N.E.2d 804 (Ind. Ct. App. 2005).

19. *Id.* at 811.

20. *Id.* (construing *Med. Licensing Bd. v. Provisor*, 669 N.E.2d 406 (Ind. 1996)).

21. *Id.* at 811-12 (quoting *Provisor*, 669 N.E.2d at 408).

22. *Id.* at 812.

23. *Id.* (quoting *Ballard v. Book Heating & Cooling, Inc.*, 696 N.E.2d 55, 56 (Ind. Ct. App. 1998)). The court noted however, that whether NRC was entitled to fees under the Indiana Surface Mining Control and Reclamation Act was an issue of first impression and that a party must demonstrate eligibility and entitlement for an award of attorney fees under the statute.

24. 820 N.E.2d 771 (Ind. Ct. App. 2005).

25. *Id.* at 781.

an administrative hearing.²⁶ Accordingly, an ALJ “performs a duty similar to that of a trial judge sitting without a jury.”²⁷

2. *Standard of Review—Non-AOPA Agencies.*—*Northern Indiana Public Service Co. v. Indiana Office of Utility Consumer Counselor*²⁸ set forth the standard of review used for IURC (or “Commission”) decisions:

[T]he Commission’s order is subject to appellate review to determine whether it is supported by specific findings of fact and by sufficient evidence, as well as to determine whether the order is contrary to law. A Commission finding can be set aside only when a review of the entire record clearly indicates that its decision lacks a reasonably sound basis of evidentiary support.²⁹

In addition, on review, the court of appeals does not reweigh the evidence or substitute its judgment for that of the Commission.³⁰

The court of appeals found that the Commission had not made a decision contrary to law and elaborated more on this standard.³¹

[A] decision is contrary to law when the agency fails to stay within its jurisdiction and to abide by the statutory and legal principles that guide it. Issues that are reviewable under this standard include questions of legality of the administrative procedure and violations of fixed legal principles as distinguished from questions of fact or expert judgment or discretion. An appellate court may properly defer to the Commission’s expertise both in finding the facts and in applying the law to the facts. The Commission has the authority to determine accounting practices for rate-regulated companies and, so long as they are within reason and prudence, courts may not interfere.³²

*Nextel West Corp. v. Indiana Utility Regulatory Commission*³³ also illustrated the standard of review with regard to issues of law.³⁴ In *Nextel*, the Indiana Court

26. *Id.* (quoting *Ind. Dep’t of Natural Res. v. United Refuse Co.*, 615 N.E.2d 100, 104 (Ind. 1993)).

27. *Id.* (citing *United Refuse*, 615 N.E.2d at 104).

28. 826 N.E.2d 112 (Ind. Ct. App. 2005).

29. *Id.* at 117-18 (citing *Spring Hills Developers, Inc. v. Reynolds Group, Inc.*, 792 N.E.2d 955, 958 (Ind. Ct. App. 2003); *U.S. Gypsum, Inc. v. Ind. Gas Co.*, 735 N.E.2d 790, 795 (Ind. 2000)).

30. *Id.* at 118 (citing *N. Ind. Pub. Serv. Co. v. LaPorte*, 791 N.E.2d 271, 279 (Ind. Ct. App. 2003)).

31. *Id.*

32. *Id.* (internal citations omitted).

33. 831 N.E.2d 134 (Ind. Ct. App. 2005), *reh’g denied* (Ind. Ct. App. 2006).

34. *See id.* at 141. The *Nextel* case is also noteworthy in that it presents a situation where the Commission approved a settlement agreement reached by less than all the parties in the case. Settlements by less than all the parties are permitted under the Commission’s rules. 170 IND. ADMIN. CODE 1-1.1-17(b) (2006).

of Appeals determined that de novo was the proper standard of review regarding a question of whether the IURC had jurisdiction to establish a universal service fund.³⁵ The court rejected use of a deferential standard of review set forth in *IDEM v. Boone County Resource Recovery Systems, Inc.*³⁶ The court of appeals found that the Commission's jurisdiction was a legal question which the court reviews de novo.³⁷

The appropriate standard of review for decisions from the Indiana Department of Workforce Development was discussed in *Abdirizak v. Review Board of the Indiana Department of Workforce Development*.³⁸ The Indiana Court of Appeals stated, "[w]hen reviewing a decision by the Review Board, our task is to determine whether the decision is reasonable in light of its findings."³⁹ The court of appeals described its review as a "substantial evidence" standard.⁴⁰ In such an analysis, the court does not reweigh the evidence or assess witness credibility, and it considers only the evidence most favorable to the agency's findings.⁴¹ Finally, the court noted that it would "reverse the decision only if there is no substantial evidence to support the Review Board's findings."⁴²

The standard applied in tax cases was described in *David R. Webb Co. v. Indiana Department of State Revenue*.⁴³ In *Webb Co.*, a manufacturing company appealed a final determination of income tax liability from the Indiana Department of State Revenue to the Indiana Tax Court. As prescribed by Indiana Code section 6-8.1-5-1(h), the Tax Court "reviews the Department [of Revenue's] final determinations de novo and is therefore not bound by either the evidence presented or the issues raised at the administrative level."⁴⁴

3. *Standard of Review—Issues of Fact.*—Appellants in *Nextel* also challenged whether the Commission's order lacked findings of fact supported by substantial evidence.⁴⁵ Review of IURC decisions is "limited to whether the

35. *Nextel*, 831 N.E.2d at 141.

36. *Id.* at 140 (discussing *Ind. Dep't of Env'tl. Mgmt. v. Boone County Res. Recovery Sys., Inc.*, 803 N.E.2d 267 (Ind. Ct. App.) (holding that "[w]hen a statute is subject to different interpretations, the interpretation of the statutes by the administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless that interpretation is inconsistent with the statute itself") (quoting *Shaffer v. State*, 795 N.E.2d 1072, 1076 (Ind. Ct. App. 2003)), *trans. denied sub nom.* *Ind. Dep't of Env'tl. Mgmt. v. Bankert*, 803 N.E.2d 807 (Ind. 2004)).

37. *Id.* at 144.

38. 826 N.E.2d 148 (Ind. Ct. App. 2005).

39. *Id.* at 150 (citing *Stanrail Corp. v. Unemployment Ins. Review Bd.*, 734 N.E.2d 1102, 1105 (Ind. Ct. App. 2000)).

40. *Id.* (citing *Stanrail Corp. v. Review Bd. of Dep't of Workforce Dev.*, 735 N.E.2d 1197, 1202 (Ind. Ct. App. 2000)).

41. *Id.* (citing *Stanrail*, 735 N.E.2d at 1202).

42. *Id.* (citing *Stanrail*, 735 N.E.2d at 1202).

43. 826 N.E.2d 166 (Ind. Tax Ct. 2005).

44. *Id.* at 168 (citing IND. CODE ANN. § 6-8.1-5-1(h) (West 2005), *amended by* 2006 Ind. Legis. Serv. P.L. 111-2006 S.E.A. 362 (West)).

45. *Nextel W. Corp. v. Ind. Util. Reg. Comm'n*, 831 N.E.2d 134, 144 (Ind. Ct. App. 2005).

agency based its decision on substantial evidence, whether the agency's decision was arbitrary and capricious, and whether it was contrary to any constitutional, statutory, or legal principle."⁴⁶

Pursuant to Indiana Code section 8-1-3-1, [judicial] review of an order of the Commission is two-tiered: [(1)] determine whether the Commission's decision contains specific findings on all of the factual determinations material to its ultimate conclusions, and [(2)] determine whether there is substantial evidence in the record to support the agency's basic findings of fact. . . . To determine whether there was substantial evidence sufficient to support the agency's determination, [the court] must consider all evidence, including evidence that supports the determination as well as evidence in opposition to the determination.⁴⁷

In *Nextel*, the Indiana Court of Appeals found that all of the Commission's determinations were supported by substantial evidence.⁴⁸ Relevant to one of the issues, the court of appeals found that the Commission could "properly accept the opinion of one expert over another."⁴⁹

Another challenged part of the order concerned whether the Commission's order was supported by substantial evidence with regard to the mandatory pass-through of the Indiana Universal Service Fund ("IUSF") surcharge, even though the order contained no specific findings concerning the IUSF surcharge.⁵⁰ The appellants argued that there was sufficient discussion of the surcharge in a section titled "Statutory Overview" which referred to a competitively neutral "mechanism."⁵¹ The Indiana Court of Appeals indicated "a more detailed factual finding by the Commission" would have aided its review but nonetheless found there was "substantial evidence in the record to support the Commission's approval of the surcharge."⁵²

4. *Standard of Review—Implementation of a Statute.—Whinery v. Roberson*⁵³ did not arise under judicial review but is noted here for its discussion on the standard of review the court uses when reviewing an agency's actions in implementing a new statute.⁵⁴ The new statute required that the State Personnel

46. *Id.* (citing *PSI Energy, Inc. v. Ind. Office of Util. Consumer Counsel*, 764 N.E.2d 769, 773 (Ind. Ct. App. 2002)).

47. *Id.* (citing *PSI Energy*, 764 N.E.2d at 773-74; *Lincoln Utils., Inc. v. Office of Util. Consumer Counselor*, 661 N.E.2d 562, 564 (Ind. Ct. App. 1996)).

48. *Id.* at 147.

49. *Id.* at 146-47 (citing *Office of the Util. Consumer Counselor v. Citizens Tel. Corp.*, 681 N.E.2d 252, 258 (Ind. Ct. App. 1997)).

50. *Id.* at 144.

51. *Id.* at 151.

52. *Id.* The Settlement Agreement that the Commission approved as part of its order did contain a description of the mandatory contribution requirement. *Id.*

53. 819 N.E.2d 465 (Ind. Ct. App. 2004), *trans. dismissed* (Ind. 2006).

54. *Id.* at 471. The case was initiated when a group of Department of Natural Resources

Department (“SPD”) conduct a survey comparing the salaries of Indiana natural resource employees to other Midwestern states and implement a salary schedule based on the survey.⁵⁵ After SPD’s survey was complete, a group of Department of Natural Resources (“DNR”) employees filed a complaint alleging the state had failed to comply with the statute.⁵⁶ The trial court entered summary judgment for the state and dismissed the employees’ complaint.⁵⁷

The court first ruled that even though

administrative agencies are vested with considerable discretion when implementing a statute that calls upon the agency to effectuate the legislature’s will, the question of whether [the new statute] create[d] contractual rights for the Employees [was] not a question the SPD was called upon to answer in its administrative capacity⁵⁸

The court of appeals found that the question was a question of law which was entirely within the province of the court.⁵⁹ The court concluded that the “Employees [could] recover contractually for deprivations of actual rights conferred upon them by [the statute], but [could] not recover for the SPD’s discretionary actions.”⁶⁰

By contrast, however, with regard to the statutory rights the employees had under the new law, SPD’s decision was entitled to deference because the statute stated that the classification system should “reflect” the results of the survey.⁶¹ Interpreting the word “reflect,” the court found that the word suggested that the General Assembly vested the SPD with discretion to change the statute.⁶² Accordingly, the court concluded that SPD’s implementation “should not be

employees filed suit in state court alleging that the State had failed to properly implement Ind. Pub. L. No. 70-1996. The trial court entered summary judgment in favor of the state and the employees appealed. *Id.* at 470-71.

55. *Id.* at 469.

56. *Id.* at 470.

57. *Id.* at 471.

58. *Id.* at 472.

59. *Id.* (citing *Orr v. Westminster Vill. N.*, 689 N.E.2d 712, 721 n.16 (Ind. 1997)). The court noted,

Though clever, the Employees’ theory must be carefully examined so as not to divest the SPD, as an administrative agency, of discretion conferred upon it by the legislature. In this examination, courts must specifically delineate between actual rights conferred by a statute and agency discretion in implementing a statute. The former is governed by canons of contract construction; the latter is not.

Id. at 474 (citing *Foley v. Consol. City of Indianapolis*, 421 N.E.2d 1160, 1163 (Ind. Ct. App. 1981)). “[T]he terms of the contract include all ‘relevant’ statutory provisions.” *Id.* (citing *Foley*, 421 N.E.2d at 1163).

60. *Id.* at 474.

61. *Id.* at 476.

62. *Id.*

vacated unless [it] exceeded its discretion.”⁶³

The employees also argued that the court was “not required to give deference to the SPD’s decision because [it] had a prior inconsistent interpretation of [the statute].”⁶⁴ The court noted that

an administrative agency is not disqualified from changing its mind; and when it does, the court still sits in review of the administrative decision and cannot approach the statutory construction issue de novo and without regard to the administrative understanding of the issues. On the other hand, [the court noted that when] an agency’s interpretation of a relevant provision . . . conflicts with an earlier interpretation [the decision] is entitled to considerably less deference than a consistently held agency view.⁶⁵

The court concluded that the language of the statute and the SPD’s own conduct indicated the legislature intended to make all professional DNR employees at issue to be given salary increases.⁶⁶

B. Arbitrary and Capricious Action

Regardless of whether the judicial review is under the AOPA or another standard, a question that is often addressed in administrative law decisions is what constitutes arbitrary and capricious action.

In *Borsuk v. Town of St. John*,⁶⁷ the Indiana Supreme Court reversed an Indiana Court of Appeals decision, finding that a town council decision was not arbitrary and capricious. A property owner whose rezoning request had been denied by the town council filed a writ of certiorari in trial court “alleging that the Town’s denial had effected an unconstitutional taking and was arbitrary and capricious.”⁶⁸ The trial court granted summary judgment in favor of the town.⁶⁹ The court of appeals reversed, finding that the town had failed to follow its comprehensive plan.⁷⁰ The Indiana Supreme Court, however, affirmed the trial court’s decision because there was evidence in the record that the plan commission and town council paid reasonable regard to each of the statutory factors, even though their decision was contradictory to the comprehensive plan.⁷¹

63. *Id.*

64. *Id.* at 477.

65. *Id.* (citing *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993)).

66. *Id.*

67. 820 N.E.2d 118 (Ind. 2005). The standard of review applied in the case was “limited to constitutionality, procedural soundness, and whether the decision was arbitrary or capricious” because rezoning is a legislative process. *Id.* at 122 (citing *Bd. of Comm’rs v. Three I Props.*, 787 N.E.2d 967, 976 (Ind. Ct. App. 2003)).

68. *Id.* at 120.

69. *Id.*

70. *Id.* at 120-21.

71. *Id.* at 122.

*Indianapolis Downs, LLC v. Indiana Horse Racing Commission*⁷² presented another action that was challenged as being arbitrary and capricious. One of Indiana's two horse racing tracks appealed the decision of the Indiana Horse Racing Commission ("IHRC") regarding how to distribute riverboat gaming subsidy funds. The Indiana Court of Appeals determined that the IHRC's action was not arbitrary and capricious and cited three reasons.⁷³ First, "the decision was based on the application of a pre-existing rule."⁷⁴ Second, the decision was consistent with prior agency practice.⁷⁵ Third, the court reasoned that "to allow Indianapolis Downs to share equally in proceeds from calendar year 2002 could properly be viewed by the IHRC as unjust because Indianapolis Downs was only in operation for less than one month of that year."⁷⁶

Finally, in *Whinery v. Roberson*,⁷⁷ the court held that "mathematical errors are, by definition, arbitrary, capricious, and a manifestation of a clear error."⁷⁸

C. Burden of Proof

*Kinnaird v. Secretary, Indiana Family & Social Services Administration*⁷⁹ noted AOPA's requirement under Indiana Code section 4-21.5-5-14(a) that the burden of proof is on the party challenging the agency action.⁸⁰ "Section 4-21.5-5-14(a) further provides that 'the burden of demonstrating the invalidity of the agency action is on the party . . . asserting invalidity.'"⁸¹

D. Standing

An additional consideration relative to judicial review that was discussed in reported cases during the survey period is standing. *Indianapolis Downs* presented an issue of whether the party challenging the agency action had standing to obtain judicial review.⁸²

An entity has standing to obtain judicial review of an agency action if (1) it is the entity to which the agency action is specifically directed; (2) it was a party to the agency proceedings that led to the agency action; (3)

72. 827 N.E.2d 162 (Ind. Ct. App. 2005).

73. *Id.* at 171.

74. *Id.*

75. *Id.*

76. *Id.*

77. 819 N.E.2d 465 (Ind. Ct. App. 2004), *trans. dismissed* (Ind. 2006).

78. *Id.* at 478.

79. 817 N.E.2d 1274 (Ind. Ct. App. 2004), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 748 (Ind. 2005).

80. *Id.* at 1277; *see also* *Indiana-Kentucky Elec. Corp. v. Comm'r, Ind. Dep't Envtl. Mgmt.*, 820 N.E.2d 771, 776 (Ind. Ct. App. 2005).

81. *Kinnaird*, 817 N.E.2d at 1277 (quoting IND. CODE § 4-21.5-5-14(a) (2004)).

82. *Indianapolis Downs, LLC v. Ind. Horse Racing Comm'n*, 827 N.E.2d 162, 169 (Ind. Ct. App. 2005).

it is eligible for standing under a law applicable to the agency action; or
(4) it is otherwise aggrieved or adversely affected by the agency action.⁸³

The Indiana Court of Appeals concluded that Indiana Downs had standing because it was a “party to the agency proceedings.”⁸⁴ “The IHRC [had] invited both Indiana Downs and Hoosier Park to submit position statements regarding how the [funds] should be allocated between the two tracks.”⁸⁵ In addition, the court of appeals found that “Indiana Downs was an entity to which the agency action was specifically directed.”⁸⁶

E. Statutory Interpretation

In *Story Bed & Breakfast LLP v. Brown County Area Plan Commission*,⁸⁷ the Indiana Supreme Court interpreted statutes regarding planned unit developments (“PUDs”) and held that “conditions” imposed on a variance or rezoning of a PUD “need not be recorded,” but must be obtained in the “records of the relevant agency” for public inspection.⁸⁸

The Brown County Area Plan Commission sought to enforce conditions of a PUD regarding property containing a bed and breakfast.⁸⁹ The property owner maintained that the conditions were not enforceable because it was a subsequent property owner and the conditions were not recorded with the property.⁹⁰ The plan commission had drawn two legal conclusions, “[f]irst, it was permissible to have enforceable conditions without recording them, and, second, that these restrictions were in that category.”⁹¹

The Indiana Supreme Court started its analysis by stating that “administrative construction of the agency’s own documents and statute is entitled to weight.”⁹² The statute at issue used both the terms “conditions” and “commitments.”⁹³ The Indiana Supreme Court stated that “[t]he wisdom of distinguishing conditions from commitments in this respect is a matter for the legislature.”⁹⁴ The court

83. *Id.* at 170 (citing IND. CODE § 4-21.5-5-3(a) (2005)); *cf.* *Huffman v. Office of Env'tl. Adjudication*, 811 N.E.2d 806, 810 (Ind. 2004).

84. *Indianapolis Downs*, 827 N.E.2d at 170.

85. *Id.*

86. *Id.*

87. 819 N.E.2d 55 (Ind. 2004).

88. *Id.* at 62.

89. *Id.* at 59.

90. *Id.*

91. *Id.* at 63-64.

92. *Id.* at 64 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Healthscript, Inc. v. State*, 770 N.E.2d 810, 814 (Ind. 2002); *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000) (“An interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself.”)).

93. *Id.* at 61.

94. *Id.* at 64.

agreed with the trial court that the Indiana statutes governing PUDs did not require that conditions attached to approval of a PUD be recorded in the recorder's office to be effective against subsequent purchasers if the conditions are available as public records.⁹⁵ Instead, conditions are "in the nature of zoning ordinances which are effective against the public at large."⁹⁶

Indiana-Kentucky presented a case in which the Indiana Court of Appeals determined the administrative agency had misconstrued the law, which in this case was an administrative rule.⁹⁷ The court started by stating that "[t]he interpretation of a statute is a question of law reserved for the courts, and is reviewed under a *de novo* standard."⁹⁸ The same principles are used to construe statutes and administrative rules.⁹⁹ Even under *de novo* review,

[i]f a statute is subject to different interpretations, the interpretation of the statute by the administrative agency charged with the duty of enforcing the statute is entitled to great weight. However, an agency's interpretation that is incorrect is entitled to no weight. [Finally,] [i]f an agency misconstrues a statute, there is no reasonable basis for the agency's ultimate action, and, therefore, the trial court is required to reverse the agency's action as being arbitrary and capricious.¹⁰⁰

At issue in *Indiana-Kentucky*, was an administrative rule that provided that applicants could seek a waiver of ambient monitoring of sulfur dioxide if the applicant could "demonstrate that the ambient monitoring [was] unnecessary to determine continued maintenance of the sulfur dioxide ambient air quality standards in the vicinity of the source."¹⁰¹ On summary judgment, the Indiana Department of Environmental Management ("IDEM") argued that the only way to determine whether a source was in compliance with ambient air quality standards was through maintaining at least one ambient monitoring station.¹⁰² The applicant, Indiana-Kentucky Electric Corporation ("IKEC"), argued that even though "the [r]ule provid[ed] that a source owner or operator may obtain a waiver of *all* of his or her monitoring requirements," that under IDEM's interpretation, an applicant would never be able to make the requisite showing.¹⁰³ Alternatively, IDEM argued that an applicant could obtain a waiver if it could show there was

95. *Id.*

96. *Id.*

97. *Indiana-Kentucky Elec. Corp v. Comm'r, Ind. Dep't of Env'tl. Mgmt.*, 820 N.E.2d 771 (Ind. Ct. App. 2005).

98. *Id.* at 777 (citing *Bourbon Mini-Mart, Inc. v. Comm'r, Ind. Dep't of Env'tl. Mgmt.*, 806 N.E.2d 14, 20 (Ind. Ct. App. 2004)).

99. *Id.* (citing *Ind. Dep't of Env'tl. Mgmt. v. Schnippel Constr.*, 778 N.E.2d 402, 415 (Ind. Ct. App. 2002)).

100. *Id.* (internal citations omitted).

101. *Id.* at 774 (internal quotation marks omitted) (quoting 326 IND. ADMIN. CODE 7-3-2(d) (2005)).

102. *Id.* at 778.

103. *Id.*

some other entity within ten kilometers conducting ambient monitoring.¹⁰⁴ The Indiana Court of Appeals found that IDEM's "construction of the Rule [was] so overly narrow as to be unreasonable."¹⁰⁵ The court also reasoned that IDEM's interpretation of the Rule made the second sentence of the Rule obsolete.¹⁰⁶ Ultimately, the court concluded that the rule had two requirements—creating a combination of what each party advocated.¹⁰⁷

The *Nextel* case also presented the Indiana Court of Appeals with an interesting statutory interpretation question from the IURC. The central issue in the *Nextel* case was whether the Commission had jurisdiction to create a universal service fund even though the statute did not explicitly authorize the Commission to do so. The statute under interpretation was an alternative regulatory statute which was designed to give the Commission flexibility to deviate from traditional ratemaking in light of an "increasingly competitive environment for telephone services."¹⁰⁸ The court relied upon its ruling in *Indiana Bell Telephone Co. v. Office of the Utility Consumer Counselor*,¹⁰⁹ in which the court of appeals found that the Alternative Regulatory Statute did not "by its language specifically grant ratemaking authority to the Commission[,]"¹¹⁰ but still provided the Commission with the necessary authority to change a telephone utility's rates.¹¹¹ In reaching its decision in the *Nextel* case, the court concluded that "[w]e simply cannot believe the legislature would expressly charge the Commission with ensuring the continuing availability of universal service without also conferring the authority necessary to effectuate that goal."¹¹²

1. *Regulation vs. Case Law*.—In *David R. Webb Co. v. Indiana Department of State Revenue*, the Tax Court resolved a conflict between an agency regulation and case law.¹¹³ Under the Indiana Administrative Code, if sales were completed

104. *Id.*

105. *Id.*

106. *Id.* at 779.

107. *Id.*

First, as IKEC [contended], an applicant seeking a waiver of all of the monitoring requirements under the Rule must show that it is likely to continue to maintain the sulfur dioxide ambient air quality standards in the future. Second, as IDEM contend[ed], the applicant must show that there is at least one or more alternative sources of data available, besides ambient monitoring at the source, from which IDEM can determine whether a source is continuing to maintain the sulfur dioxide ambient air quality standards in the vicinity of the source.

Id.

108. *Nextel W. Corp. v. Ind. Util. Regulatory Comm'n*, 831 N.E.2d 134, 143 (Ind. Ct. App. 2005).

109. 717 N.E.2d 613, 622 (Ind. Ct. App. 1999), *modified on reh'g*, 725 N.E.2d 432 (Ind. Ct. App. 2000).

110. *Id.*

111. *Nextel*, 831 N.E.2d at 143.

112. *Id.*

113. 826 N.E.2d 166 (Ind. Tax Ct. 2005).

in Indiana, they were taxable.¹¹⁴ The Tax Court found that “[i]f a regulation conflicts with a case law interpretation, little weight is afforded the regulation.”¹¹⁵ Additionally, an administrative interpretation that is incorrect is entitled to no weight.¹¹⁶ The Tax Court concluded that to have force, the regulation must be consistent with the relevant case law¹¹⁷ if the regulation exceeded the scope of the case law, it was invalid.¹¹⁸

The tax court resolved the case without going as far as to declare that the regulation was invalid. Based on the facts of the case, the court concluded that the sales were interstate sales.¹¹⁹

2. *Legislative Acquiescence.*—The doctrine of legislative acquiescence provides that “a longstanding publicly known administrative interpretation of a statute dating from the time of the statute’s enactment with no substantial change made to the statute raises the strongly persuasive presumption that the legislature has acquiesced in the agency’s interpretation.”¹²⁰ The Indiana Court of Appeals rejected the application of the doctrine in *Whinery v. Roberson*.¹²¹ The court stated that “in order to invoke properly the doctrine of legislative acquiescence, the administrative interpretation in question must be ‘long standing.’”¹²² In *Whinery*, the appellants filed their complaint two weeks after the statute’s implementation; therefore, the court of appeals found that the doctrine of legislative acquiescence was inapplicable.¹²³

F. Scope of Judicial Review

A group of affected persons challenged the Bureau of Motor Vehicles’ (“BMV”) implementation of new identification requirements in *Villegas v. Silverman*.¹²⁴ Upon judicial review, the trial court found “that even if it were to invalidate the identification requirements, the result would be the same” because the BMV had discretion “to issue licenses in the manner the Bureau considers necessary and prudent and that such prudence is incapable of judicial review.”¹²⁵ The Indiana Court of Appeals found this conclusion to be erroneous. First, it

114. *Id.* at 169; 45 IND. ADMIN. CODE 1-1-119(2)(b) (2005).

115. *Webb Co.*, 826 N.E.2d at 170 (citing *Bethlehem Steel Corp. v. Ind. Dep’t of State Revenue*, 597 N.E.2d 1327, 1335 (Ind. Tax Ct. 1992), *aff’d*, 639 N.E.2d 264 (Ind. 1994)).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Miller Brewing Co. v. Bartholemew County Beverage Co.*, 674 N.E.2d 193, 206 n.10 (Ind. Ct. App. 1996).

121. 819 N.E.2d 465, 476 (Ind. Ct. App. 2004), *trans. dismissed* (Ind. 2006).

122. *Id.* (quoting *Miller Brewing Co.*, 674 N.E.2d at 206 n.10).

123. *Id.*

124. 832 N.E.2d 598 (Ind. Ct. App.), *reh’g denied* (Ind. Ct. App. 2005), *trans. dismissed* (Ind. 2006).

125. *Id.* at 610.

noted that

the rules implemented by the BMV are always judicially reviewable for constitutional implications. Second, the ARPA requires. . . public input into any proposed rule changes. The duty of the BMV to issue licenses in a manner that it deems prudent does not supercede the mandate to allow the public to participate in the rule-making process.¹²⁶

G. Exhaustion of Administrative Remedies

The number of Indiana Supreme Court decisions during the survey period with regard to exhaustion of administrative remedies was notable. As shown in many of these cases, failure to exhaust administrative remedies can be a critical flaw in a litigant's case.

In *State ex rel. Attorney General v. Lake Superior Court*,¹²⁷ taxpayers challenging a new state law regarding property tax assessments in Lake County filed for an injunction in state court. The State appealed the issuance of a preliminary injunction, and also petitioned for a writ of mandamus and prohibition because "the trial court lacked jurisdiction based on the plaintiff's failure to exhaust administrative remedies."¹²⁸ The court stayed the preliminary injunction and its order in the case addressed both the appeal and the writ of mandamus and prohibition.¹²⁹

Writing for the majority, Justice Boehm agreed with the State that the plaintiffs had failed to exhaust their administrative remedies.¹³⁰ Referring to the relevant statutory framework, the court noted that it incorporated AOPA and its provisions "requiring exhausting of administrative remedies before judicial review may be initiated."¹³¹ The court found that the challenge the plaintiffs sought to make—a constitutional challenge to the statutes creating the reassessment and a challenge to the way in which the assessment was conducted—must be made in the first instance to the Indiana Board of Tax Review, with judicial review to the Tax Court.¹³² In this case, the plaintiffs filed their case directly with the state court and therefore failed to exhaust their administrative remedies.

The impact of failure to exhaust administrative remedies is fatal. It is "a defect in subject matter jurisdiction" and renders a judgment void.¹³³

126. *Id.* (internal citations and footnote omitted).

127. 820 N.E.2d 1240 (Ind.), *reh'g denied* (Ind.), and *cert. denied sub nom. Miller Citizens Corp. v. Carter*, 126 S. Ct. 398 (2005).

128. *Id.* at 1245-46.

129. *Id.*

130. *Id.* at 1246.

131. *Id.*

132. *Id.*

133. *Id.* at 1247 (citing *M-Plan, Inc. v. Ind. Comprehensive Health Ins. Ass'n*, 809 N.E.2d 834, 837 (Ind. 2004)); *see also* *City of Marion v. Howard*, 832 N.E.2d 528, 531 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App. 2005), *trans. denied* (Ind.), *cert. denied*, 126 S. Ct. 2358 (2006).

“Accordingly, the trial court was without jurisdiction to entertain [the] claim, and a writ of prohibition [was] properly requested.”¹³⁴

Justice Sullivan concurred in Justice’s Boehm’s opinion and discussed the policy behind the exhaustion of remedies doctrine.¹³⁵ He wrote that “it appears unwieldy if not unfair that taxpayers who believe they have been wrongly assessed—particularly, as in this case, where [the plaintiffs asserted constitutional challenges]—must go through several layers of administrative review before being allowed to appeal to the Tax Court.”¹³⁶ However, Justice Sullivan noted that “it is up to the Legislature to determine the jurisdiction of Indiana trial courts” and there were sound policy reasons for requiring tax appeals.¹³⁷ First, he noted that tax protests are frequent but “taxes are needed to provide public safety and other public services.”¹³⁸ “A system that channels tax protests through an orderly system of administrative and Tax Court review without risking abrupt stoppages in tax collections by order of any one of the state’s hundreds of trial courts protects the interest of both taxpayers and all of us who rely on government services.”¹³⁹ In addition, he noted that the statutory system allows the executive and legislative branches to effect compromises of tax controversies, rather than have the answers dictated by a variety of courts.¹⁴⁰

Other policies that are cited in support of the doctrine of exhaustion of remedies are giving the administrative agency the opportunity to correct its own mistakes and develop of an adequate record for judicial review.¹⁴¹

The harshness of the application of the doctrine, discussed by Justice Sullivan, was illustrated in *City of Marion v. Howard*,¹⁴² where the Indiana Court of Appeals applied the doctrine sua sponte and reversed a jury verdict in favor of the plaintiffs from the trial court.¹⁴³

At trial, property owners prevailed on a § 1983 complaint that local officials persuaded the local Board of Zoning Appeals (“BZA”) to vote against the pending matters regarding the property owners’ land, which resulted in an unconstitutional taking of their property by the government.¹⁴⁴ On appeal, however, the court of appeals found that “the trial court lacked subject matter jurisdiction to enter judgment on the [property owner’s] claim that the government unconstitutionally took their property when the BZA decided that

134. *State of Indiana ex rel.*, 820 N.E.2d at 1247.

135. *Id.* at 1256 (Sullivan, J., concurring).

136. *Id.* at 1257.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Advantage Home Health Care, Inc. v. Ind. State Dept. of Health*, 829 N.E.2d 499, 503-04 (Ind. 2005).

142. 832 N.E.2d 528 (Ind. Ct. App.), *reh’g denied* (Ind. Ct. App. 2005), *trans. denied* (Ind.), *cert. denied*, 126 S. Ct. 2358 (2006).

143. *Id.* at 529.

144. *Id.* at 531.

[their business] was a junkyard.”¹⁴⁵

Unlike a case arising under AOPA, the framework for the requirement of exhaustion of administrative remedies resulted from application of the U.S. Supreme Court’s decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*¹⁴⁶ and the Indiana Supreme Court’s decision in *Town Council of New Harmony v. Parker*.¹⁴⁷ After an extensive discussion of both cases, the court of appeals concluded that the “‘finality requirement’ affects a trial court’s subject matter jurisdiction to hear a takings claim, and that failure to obtain a final decision from the appropriate agency regarding land use amounts to a failure to exhaust administrative remedies.”¹⁴⁸

However, the court held that the trial court did have subject matter jurisdiction to rule on the portion of the property owner’s claim that related to the city attorney’s padlocking of their business premises.¹⁴⁹ “The evidence at trial established that this event was unrelated to the BZA’s rulings in this case, and was part of a separate nuisance abatement action the City wished to instigate against the [property owners].”¹⁵⁰

1. *Exceptions to the Requirement of Exhaustion of Remedies.*—Plaintiff-appellant tried to avoid the exhaustion of remedies doctrine in *Johnson v. Celebration Fireworks, Inc.*¹⁵¹ The Indiana Court of Appeals initially accepted these arguments, but the Indiana Supreme Court reversed.¹⁵²

Plaintiff, Celebration Fireworks, brought a declaratory judgment and injunction action regarding a dispute whether state law required payment of a permit fee per location or per seller. Celebration had relied on the supreme court’s decision in *Indiana Department of Environmental Management v. Twin*

145. *Id.* at 534.

146. 473 U.S. 172 (1985).

147. 726 N.E.2d 1217 (Ind. 2000).

148. *Howard*, 832 N.E.2d at 534. Analyzing the effect of *Williamson*’s “final decision” requirement on Indiana procedure, the court noted:

The *Williamson* opinion does state that its “final decision” requirement is not necessarily the same as requiring the exhaustion of administrative remedies, although “the policies underlying the two concepts often overlap”

[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

Id. at 533-34 (internal citation omitted) (bracket in original) (quoting *Williamson*, 473 U.S. at 192-93).

149. *Id.* at 536.

150. *Id.*

151. 829 N.E.2d 979 (Ind. 2005).

152. *Id.* at 983-84.

*Eagle LLC*¹⁵³ as support for the contention that exhaustion of remedies was not required.¹⁵⁴ The court distinguished *Twin Eagle* because the issue in that case was “statutory construction, [and] whether any agency possesse[d] jurisdiction over a matter [as that] [was] a question of law for the courts.”¹⁵⁵ In comparison, in the present case, it was clear that the Fire Marshal had legal authority to license fireworks wholesalers.¹⁵⁶

The court also rejected Celebration’s arguments under the futility exception to the doctrine of exhaustion of administrative remedies.¹⁵⁷ “To prevail upon a claim of futility, ‘one must show that the administrative agency was powerless to effect a remedy or that it would have been impossible or fruitless and of no value under the circumstances.’”¹⁵⁸

Celebration argued the futility exception was appropriate because it believed it was inevitable that the agency would rule against it.¹⁵⁹ The court rejected this argument. “[T]he mere fact that an administrative agency might refuse to provide the relief requested does not amount to futility.”¹⁶⁰

2. *Exhaustion of Remedies and Primary Jurisdiction.*—*Sun Life Assurance Co. of Canada v. Indiana Comprehensive Health Insurance Ass’n*¹⁶¹ prompted the Indiana Court of Appeals to discuss the differences between the doctrine of exhaustion of remedies and primary jurisdiction. In *Austin Lakes Joint Venture v. Avon Utilities, Inc.*,¹⁶² the court stated that under the doctrine of primary jurisdiction, “[i]f at least one the issues involved in the case is within the jurisdiction of the trial court, the entire case falls within its jurisdiction, even if one or more of the issues are clearly matters for exclusive administrative or regulatory agency determination.”¹⁶³ “The doctrine of primary jurisdiction is not . . . jurisdictional, [like the doctrine of exhaustion of remedies,] but prudential.”¹⁶⁴

In *Sun Life*, the insurance provider argued that the question of whether it was required to be a member of the Indiana Comprehensive Health Insurance Association by statute was a mixed question of law and fact such that it was appropriate for the trial court to have jurisdiction under the doctrine of primary jurisdiction.¹⁶⁵ The court of appeals rejected this argument. It found that whether

153. 798 N.E.2d 839 (Ind. 2003).

154. *Johnson*, 829 N.E.2d at 983.

155. *Id.* (internal quotation marks omitted) (first and third brackets in original) (quoting *Twin Eagle*, 798 N.E.2d at 844).

156. *Id.*

157. *Id.* at 984.

158. *Id.* (quoting *M-Plan, Inc. v. Ind. Comprehensive Health Ins. Ass’n*, 809 N.E.2d 834, 840 (Ind. 2004)).

159. *Id.*

160. *Id.* (citing *Spencer v. State*, 520 N.E.2d 106, 110 (Ind. Ct. App. 1988)).

161. 827 N.E.2d 1206 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 186 (Ind. 2005).

162. 648 N.E.2d 641 (Ind. 1995).

163. *Id.* at 646.

164. *Id.* at 645.

165. *Sun Life*, 827 N.E.2d at 1210.

a particular provider falls within a statutory definition was a question that generally must be left to the agency.¹⁶⁶ In this case, the Association had found Sun Life to be a member, but that Sun Life failed to pursue its administrative remedies.¹⁶⁷

II. AGENCY ACTION

A. *In General*

The principle that an agency's authority is limited by statute was demonstrated in *Indiana Office of Utility Consumer Counselor v. Lincoln Utilities, Inc.*¹⁶⁸ The Indiana Court of Appeals found that the IURC had exceeded its statutory authority in valuing a water utility including property contributed in the aid of construction ("CIAC").¹⁶⁹ Despite the IURC's technical expertise to administer regulatory schemes and deference to the IURC's rate-making methodology, the court of appeals found that "the IURC had improperly exceeded its statutory authority."¹⁷⁰ The Commission had interpreted the relevant statutes as giving it a range in which to value utilities, including whether to include CIAC.¹⁷¹ However, the court of appeals rejected this interpretation. It found the statutes in question created "no spectrum of utility valuation."¹⁷²

1. *Official Board Action.*—In *Borsuk v. Town of St. John*,¹⁷³ the property owner made a procedural contention that the trial court should not have considered an affidavit of the President of the Plan Commission, but rather relied solely on the minutes of the Plan Commission and Town Council.¹⁷⁴ The Indiana Supreme Court stated, "Generally, 'boards and commissions speak or act officially only through the minutes and records made at duly organized meetings.'"¹⁷⁵ Although "evidence outside of a commission meeting offered by members of the commission cannot *substitute* for the minutes of the meeting, evidence used to *supplement* the minutes is properly admissible."¹⁷⁶

2. *Open Door/Open Records Statutes.*—During the survey period, there were no cases on Indiana's Open Records Law,¹⁷⁷ and only one case with regard to the

166. *Id.* (citing *State ex rel. Paynter v. Marion County Superior Court*, 344 N.E.2d 846 (Ind. 1976)).

167. *Id.* at 1213.

168. 834 N.E.2d 137, 142 (Ind. Ct. App. 2005), *trans. denied* (Ind. 2006).

169. *Id.* at 146.

170. *Id.* at 145 (internal citations omitted).

171. *Id.* at 145-46.

172. *Id.* at 146 (internal quotation marks omitted).

173. 820 N.E.2d 118 (Ind. 2005).

174. *Id.* at 122-23.

175. *Id.* at 123 (quoting *Brademas v. St. Joseph County Comm'rs*, 621 N.E.2d 1133, 1137 (Ind. Ct. App. 1993)).

176. *Id.* (citing *Peavler v. Bd. of Comm'rs*, 528 N.E.2d 40, 48 (Ind. 1988)).

177. IND. CODE §§ 5-14-3-1 to -10 (2005).

Open Door Law.¹⁷⁸ During 2005, both statutes were amended slightly. The most significant changes were to exempt certain records of the Indiana economic development corporation,¹⁷⁹ Indiana Finance Authority,¹⁸⁰ and Office of Tourism Development from the Open Records Law.¹⁸¹

In *Markland v. Jasper County Planning & Development Department*,¹⁸² the Indiana Court of Appeals rejected an argument that Indiana's Open Door Law applied to a Technical Advisory Committee of a local planning Commission.¹⁸³ The court noted that the committee examines "the 'street and utility' components of a proposed subdivision and reports . . . to the Commission, but the decision to grant approval to a subdivision plan is made by the Commission."¹⁸⁴ The Commission, not the committee, was the public agency to which the Open Door Law applied.¹⁸⁵

3. *Other Statutory Changes to ARPA or AOPA.*—ARPA and AOPA are subject to frequent "fine-tuning" changes by the Legislature. 2005 was no exception. A new chapter was added to ARPA requiring agencies to specifically describe the economic impact of rules on small businesses.¹⁸⁶ The notice period for rulemaking was shortened from thirty days to twenty-eight days.¹⁸⁷ Also, legislation was passed that beginning on July 1, 2006, the Indiana Register shall be published in electronic form only.¹⁸⁸

B. Adjudication

1. *Whether Agency Actions Are Orders.*—In *Advantage Home Health Care, Inc. v. Indiana State Department of Health*,¹⁸⁹ a home health care company brought a declaratory judgment action against the state board of health claiming that the inspection reports and accompanying requests for correction of deficiencies were appealable orders under AOPA.¹⁹⁰ As a requirement to maintain its state and federal certification, Advantage was subject to inspections by the state board of health.¹⁹¹ Under the challenged inspection, the Board of Health's investigator produced two survey reports.¹⁹² The Department sent the

178. *Id.* §§ 5-14-1.5-1 to -8.

179. *Id.* § 5-14-3-4.5.

180. *Id.* § 5-14-3-4.7.

181. *Id.* § 5-14-3-4.8.

182. 829 N.E.2d 92 (Ind. Ct. App. 2005).

183. *Id.* at 98.

184. *Id.* at 97.

185. *Id.*

186. IND. CODE §§ 4-22-2.1-1 to -8 (2005); *id.* §§ 4-22-3-1 to -3.

187. *Id.* § 4-22-2-23.

188. *Id.* § 4-22-8-2.

189. 829 N.E.2d 499 (Ind. 2005).

190. *Id.* at 500.

191. *Id.* at 501.

192. *Id.*

reports and an accompanying letter that requested that the home health agency submit a “plan of correction” to detail how it would address the identified violations.¹⁹³ The home health agency also had an opportunity to challenge the deficiencies through an Internal Dispute Resolution (“IDR”) process, which consisted of both a paper review and a “face-to-face” review of the statement of deficiencies.¹⁹⁴

In a survey conducted in 2001, the Board of Health identified several violations of state and federal rules and regulations at Advantage.¹⁹⁵ Advantage filed a plan of correction and requested administrative review under AOPA.¹⁹⁶ “The Department responded . . . that the surveys did not constitute orders and were not subject to review under AOPA.”¹⁹⁷ Advantage initiated a paper review of both the state and federal surveys through the IDR process, but only a “face-to-face” review of the federal survey.¹⁹⁸

Advantage subsequently filed a declaratory judgment complaint seeking to reverse the Department’s position that a survey was not an order subject to review under AOPA.¹⁹⁹ The trial court granted summary judgment in favor of the Department, concluding that the surveys were exempted from AOPA pursuant to the Indiana Code and also that the surveys were not orders “because they simply documented the findings of investigations.”²⁰⁰

Although the court of appeals found the statement of deficiencies were orders requiring home health agencies “to file a plan of correction ‘within a certain period of time and in a certain required manner,’” the Indiana Supreme Court disagreed.²⁰¹ The supreme court found that the statements were “little more than the initial summation of [the Department’s] investigation.”²⁰² The statements “produce[d] nothing that approach[ed] a ‘formal agency mandate.’”²⁰³

The function of an administrative investigation is to “obtain information to govern future action, and is not a proceeding in which action is taken against anyone.”²⁰⁴ An investigation is “distinct from an adjudication” because the “purpose of an . . . investigation is to discover and procure evidence, and not to prove a pending charge or complaint.”²⁰⁵ The Indiana Supreme Court found that

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 502.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* (citing IND. CODE § 4-21.5-2-5(9), (10) (2005)).

201. *Id.* (quoting *Advantage Home Health Care, Inc. v. Ind. State Dept’ of Health*, 792 N.E.2d 914, 917 (Ind. Ct. App. 2003), *vacated*, 829 N.E.2d 499 (Ind. 2005)).

202. *Id.* at 504.

203. *Id.*

204. *Id.* (internal quotation marks omitted) (quoting 73 C.J.S. *Public Administrative Law & Procedure* § 145 (2004)).

205. *Id.* (internal quotation marks omitted) (quoting 73 C.J.S. *Public Administrative Law &*

the statement of deficiencies were in the first category because they serve as the “starting point from which the Department may judge the compliance of the home health care agency.”²⁰⁶

Although an order under AOPA is defined as “1) an administrative agency action of; 2) particular applicability; 3) that establishes definitely; 4) the duty to submit a plan of correction,”²⁰⁷ the court found that the “‘duty’ to submit a plan of correction [was], at best, modest.”²⁰⁸ A home health care agency could file “nothing more than . . . a statement asserting that the . . . agency believes itself to be in compliance with the applicable state laws and regulations.”²⁰⁹ The court believed these were “minimal agency requirements” and found it hard to believe that the legislature intended to require “routine judicial oversight” of such actions.²¹⁰

The court also looked to the reasoning of an analogous case from the D.C. Circuit, a frequent arbiter of administrative law disputes.²¹¹ Though not identical, AOPA’s definition of “order” and the federal definition of “final agency action” were comparable.²¹² Referring to a D.C. Circuit opinion, the court found that the survey report was “preliminary” in the sense that the IDR process was available to Advantage and accordingly the results of the report were subject to challenge if the Department ever used the survey report as the basis for imposing sanctions against the home health care agency.²¹³

Finally, the Indiana Supreme Court noted that “if such a minimal response would be enough to require review it would subject agencies to judicial oversight of relatively simple communications.”²¹⁴

Indianapolis Downs also presented an issue regarding whether agency action constituted an order.²¹⁵ Indiana Downs filed a Verified Petition for Review pursuant to the AOPA.²¹⁶ The trial court dismissed its complaint for lack of subject matter jurisdiction because 1) the IHRC decision did not constitute “agency action” subject to judicial review; and 2) the IHRC was not required to comply with formal rulemaking procedures because its decision was consistent

Procedure § 145 (2004)).

206. *Id.*

207. *Id.* (internal quotation marks omitted) (citing IND. CODE § 4-21.5-1-9 (2005)).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* In *Reliable Automatic Sprinkler Co. v. Consumer Product Safety Commission*, 324 F.3d 726 (D.C. Cir. 2003), the circuit court found that a preliminary determination that a sprinkler head manufactured by Reliable constituted a “substantial product hazard” was not an Order under the Federal Administrative Procedures Act. *Id.* at 731.

212. *Advantage*, 829 N.E.2d at 504 n.4.

213. *Id.* at 505.

214. *Id.*

215. *Indianapolis Downs, LLC v. Ind. Horse Racing Comm’n*, 827 N.E.2d 162, 163 (Ind. Ct. App. 2005).

216. *Id.* at 167.

with its own past and accepted practices.²¹⁷

The Indiana Court of Appeals found that the IHRC's decision was an agency action subject to judicial review because it was an order.²¹⁸ AOPA defines an order "as an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons."²¹⁹

[A] rule is defined as the whole or any part of an agency statement of general applicability that has or is designed to have the effect of law and implements, interprets, or prescribes law or policy or the organization, procedure, or practice requirements of an agency. Case law has attempted to further draw a distinction between an administrative order and an administrative rule by recognizing that an order operates retrospectively upon events that have already occurred, whereas a rule has a prospective effect.²²⁰

Because the IHRC adopted the Staff Recommendation, which required the funds to be distributed on an accrual basis, the IHRC had determined the legal rights and interests of Indiana Downs.²²¹ The court of appeals also concluded that "the IHRC's decision had a retrospective application" which is also indicative of an order.²²² The court of appeals relied upon its decision in *Smith v. State Lottery Commission of Indiana*,²²³ in which a lottery winner contested the Lottery Commission's failure to pay the prize for an instant winning ticket because it was submitted more than sixty days after the end of a game.²²⁴ The court of appeals determined that the application of a lottery rule to an individual case was actually an order.²²⁵

2. *Due Process*.—Two similar fact scenarios produced different findings on due process issues in *Abdirizak v. Review Board of the Indiana Department of Workforce Development*²²⁶ and *Ennis v. Department of Local Government Finance*.²²⁷

In *Abdirizak*, an applicant for unemployment benefits appealed the decision of the Review Board of the Indiana Department of Workforce Development's

217. *Id.* at 163, 167.

218. *Id.* at 169.

219. *Id.* at 168 (citing IND. CODE § 4-21.5-1-9 (2005)).

220. *Id.* (citing IND. CODE § 4-21.5-1-14 (2005); *Smith v. State Lottery Comm'n of Ind.*, 701 N.E.2d 926, 930 (Ind. Ct. App. 1998)); *see also* *Miller Brewing Co. v. Bartholemew County Beverage Co.*, 674 N.E.2d 193, 202 (Ind. Ct. App. 1996).

221. *Indianapolis Downs*, 827 N.E.2d at 168.

222. *Id.* at 169.

223. 701 N.E.2d 926.

224. *Indianapolis Downs*, 827 N.E.2d at 169 (citing *Smith*, 701 N.E.2d at 930).

225. *Id.* (citing *Smith*, 701 N.E.2d at 931).

226. 826 N.E.2d 148 (Ind. Ct. App. 2005).

227. 835 N.E.2d 1119 (Ind. Tax Ct. 2005).

determination denying his claim for benefits.²²⁸ The applicant argued that he had not received notice of the hearing.²²⁹ He had initially returned a form indicating he would participate at the hearing, but there was no response to a form which was sent out after the hearing was continued to another date.²³⁰

The Review Board did not conduct a hearing on whether the applicant had received notice.²³¹ The Indiana Court of Appeals reasoned that if the applicant “is able to show that he did not receive notice . . . , then he was not afforded an opportunity to be heard, and, thus, he was not afforded due process on his underlying substantive claim.”²³² The court of appeals found that the agency must conduct an evidentiary hearing on the applicant’s claim of inadequate notice in order to determine whether the requirements of due process had been met.²³³

Ennis involved a taxpayer appealing a real property assessment from the Department of Local Government Finance to the Indiana Board of Tax Review (“Indiana Board”).²³⁴ The Indiana Board set a hearing on the matter and sent Ennis notice by regular U.S. mail.²³⁵ It was uncontested that the Indiana Board sent the notice to Ennis, but he claimed that he did not receive the notice until after the hearing date.²³⁶ In a letter to the Indiana Board, he suggested that there was another property in his area with a similar address and that mail frequently was misdelivered.²³⁷ The Tax Court affirmed the Indiana Board’s decision that Ennis had received adequate notice and dismissed Ennis’ appeal.²³⁸ However, the Tax Court found that the Indiana Board did not act arbitrarily, capriciously, or abuse its discretion in making the determination that Ennis had received adequate notice.²³⁹

The Tax Court noted that the Indiana Board, “while an administrative body, is vested with quasi-judicial powers” under Indiana Code sections 6-1.5-4-1 and 6-1.5-5-1 to 6-1.5-5-5.²⁴⁰ “When an agency acts in a quasi-judicial capacity, it must accord due process to those parties whose rights will be affected by its actions.”²⁴¹ “Due process generally requires notice and an opportunity to be heard.”²⁴² The Tax Court even quoted *Abdirizak* to state “that a party required to

228. *Abdirizak*, 826 N.E.2d at 149.

229. *Id.*

230. *Id.*

231. *Id.* at 151.

232. *Id.*

233. *Id.*

234. *Ennis v. Dep’t of Local Gov’t Fin.*, 835 N.E.2d 1119, 1120 (Ind. Tax Ct. 2005).

235. *Id.* at 1120-21.

236. *Id.* at 1121.

237. *Id.*

238. *Id.* at 1123.

239. *Id.*

240. *Id.* at 1122.

241. *Id.* (citing *City of Hobart Common Council v. Behavioral Inst. of Ind., LLC*, 785 N.E.2d 238, 246 (Ind. Ct. App. 2003)).

242. *Id.* (citing *Galligan v. Ind. Dep’t of State Revenue*, 825 N.E.2d 467, 472 (Ind. Tax Ct.),

be served notice must 'receive actual, timely notice.'"²⁴³

One important factual difference between *Abdirizak* and *Ennis* is that in *Ennis* it was undisputed that the administrative agency had actually sent the notice to the applicant at his correct address. Another difference is that the Indiana Board in *Ennis* did give Ennis a greater opportunity to present evidence on his lack of notice. After Ennis failed to appear at the hearing, the Indiana Board sent him a letter indicating he could submit a written request that the order be vacated including "supportive facts stating why [he] did not appear at the hearing and showing cause why [h]is appeal should not be dismissed."²⁴⁴ Ennis only suggested that the mail had been misdelivered. The court noted he could have attached an affidavit or additional evidence instead.²⁴⁵

Another due process issue was presented by *In re Change to the Established Water Level of Lake of the Woods in Marshall County*.²⁴⁶ The appellant argued that the panel of reviewers, which was functioning in the same manner as an administrative agency, was biased because the members "had previously formed an opinion on the [applicant's] petition during the original action, which was marred by deficient procedures."²⁴⁷

The Indiana Court of Appeals stated that "due process requires that a hearing be conducted before an impartial body."²⁴⁸ "[W]hen a biased board or panel member participates in a decision, the decision will be vacated."²⁴⁹ "Nevertheless, because many administrative boards or panels are usually composed of persons without legal training, courts are reluctant to impose strict technical requirements upon their procedure."²⁵⁰ "[P]rior involvement in an investigation does not automatically bias or disqualify an administrative body, such as the viewers in [Lake of the Woods]."²⁵¹ The court of appeals found that the appellant failed to demonstrate any bias by the panel and that the court would presume that an administrative panel acted properly and without bias or prejudice.²⁵²

Another due process concept is discrimination between similarly situated parties. In a case from the IURC, the Indiana Court of Appeals stated the

trans. denied, 841 N.E.2d 180 (Ind. 2005)).

243. *Id.* (quoting *Abdirizak v. Review Bd. of Ind. Dep't of Workforce Dev.*, 826 N.E.2d 148, 150 (Ind. Ct. App. 2005)).

244. *Id.* at 1121 (brackets in original).

245. *Id.* at 1123 n.5.

246. 822 N.E.2d 1032 (Ind. Ct. App.), *trans. denied sub nom.* *Lake of the Woods Property Owners v. Ralston*, 841 N.E.2d 177 (Ind. 2005).

247. *Id.* at 1041.

248. *Id.* (citing *Kollar v. Civil City of South Bend*, 695 N.E.2d 616, 623 (Ind. Ct. App. 1998)).

249. *Id.* (citing *Ripley County Bd. of Zoning Appeals v. Rumpke of Ind., Inc.*, 663 N.E.2d 198, 209 (Ind. Ct. App. 1996)).

250. *Id.* (citing *Ripley*, 663 N.E.2d at 209).

251. *Id.* (citing *Koeneman v. City of New Haven*, 506 N.E.2d 1135, 1138 (Ind. Ct. App. 1987)).

252. *Id.*

Commission is “not required to afford identical relief to all utilities in every circumstance.”²⁵³ “[T]he relevant question is not the degree of consistency with prior orders but rather whether there is a reasonable basis for [the agency] decision in the particular case.”²⁵⁴

3. *Settlements*.—A quote from the Indiana Court of Appeals summarizes the special nature of settlements in administrative law.

Settlement carries a different connotation in administrative law and practice from the meaning usually ascribed to settlement of civil actions in a court. While trial courts perform a more passive role and allow the litigants to play out the contest, regulatory agencies are charged with a duty to move on their own initiative where and when they deem appropriate. Any agreement that must be filed and approved by an agency loses its status as a strictly private contract and takes on a public interest gloss.²⁵⁵

The court went on to note, “[t]o be sure, regulatory settlements are distinguishable from agreements that are governed purely by contract law.”²⁵⁶

In commenting on a case arising from the IURC, the Indiana Court of Appeals stated “[The IURC] has broad authority to supervise settlement agreements . . . and to be proactive in protecting the public interest.”²⁵⁷ A reviewing court should give substantial deference to a decision made by the Commission regarding a prior settlement.²⁵⁸ The court particularly noted that decisions regarding accounting practices followed by public utilities are policy determinations, which are committed to the sound discretion of the Commission.²⁵⁹ In such situations, “judicial interference is inappropriate so long as the Commission acts within reason and prudence.”²⁶⁰

The *Nextel* case discussed previously also discusses the nature of settlements. The court of appeals stated that “[A]n agency may not accept a settlement merely because the private parties are satisfied; rather, an agency must consider whether

253. *N. Ind. Pub. Serv. Co. v. Ind. Office of Util. Consumer Counselor (NIPSCO)*, 826 N.E.2d 112, 119 (Ind. Ct. App. 2005).

254. *Id.* (citing *Ogden v. Premier Properties, USA, Inc.*, 755 N.E.2d 661, 671 (Ind. Ct. App. 2001)).

255. *Id.* at 118 (bracket omitted) (quoting *Citizens Action Coalition of Ind., Inc. v. PSI Energy, Inc.*, 664 N.E.2d 401, 406 (Ind. Ct. App. 1996)); *see also* *Nextel W. Corp. v. Ind. Util. Regulatory Comm’n*, 831 N.E.2d 134, 155 (Ind. Ct. App. 2005), *reh’g denied* (Ind. Ct. App. 2006).

256. *NIPSCO*, 826 N.E.2d at 118 (citing *Ind. Bell Tel. Co. v. Office of Util. Consumer Counselor*, 725 N.E.2d 432, 435 (Ind. Ct. App. 2000)).

257. *Id.* at 119 (citing *Citizens Action Coalition of Ind. v. N. Ind. Pub. Serv. Co.*, 796 N.E.2d 1264, 1267-68 (Ind. Ct. App. 2003)).

258. *Id.* (citing *U.S. Gypsum, Inc. v. Ind. Gas Co.*, 735 N.E.2d 790, 803-04 (Ind. 2000)).

259. *Id.*

260. *Id.* (citing *Ind. Gas Co. v. Office of Util. Consumer Counselor*, 675 N.E.2d 739, 747 (Ind. Ct. App. 1997)).

the public interest will be served by accepting the settlement.”²⁶¹

The appellants argued that the settlement agreement which had been accepted by the IURC must be held to a higher burden of proof because the settlement agreement was opposed by the Office of the Utility Consumer Counselor (“OUCC”), an agency “mandated by statute to ‘have charge of the interest of the ratepayers and consumers of the utility.’”²⁶² The Indiana Court of Appeals rejected this argument, although it noted that “the policies favoring settlement agreements are ‘further enhanced’” when the OUCC is one of the parties supporting the settlement agreement.²⁶³ The court referred to the statute that provides that “settlement agreements by some or all of the parties to a proceeding that are filed with the Commission must be supported by ‘probative evidence.’”²⁶⁴ Although probative evidence was not defined, the court found that any settlement supported by substantial evidence and found to be in the public interest by the Commission met the requisite standard.²⁶⁵

C. Rulemaking

1. *Invalid or Improper Rule.*—Agencies must comply with the ARPA if they are promulgating a rule.²⁶⁶ “On the other hand, agency actions that result in resolutions or directives that relate to internal policy, procedure, or organization and do not have the effect of law are not subject to the same requirements.”²⁶⁷

Indiana Code section 4-22-2-3(b) defines a “rule” as: “[T]he whole or any part of an agency statement of general applicability that: (1) has or is designed to have the effect of law; and (2) implements, interprets, or prescribes: (A) law or policy; or (B) the organization, procedure, or practice requirements of an agency.”²⁶⁸

In *Villegas*, the Indiana Court of Appeals discussed this definition and the characteristics of a rule as described in *Blinzinger v. Americana Healthcare Corp.*²⁶⁹ In *Blinzinger*, the court of appeals

261. *Nextel W. Corp. v. Ind. Util. Reg. Comm’n*, 831 N.E.2d 134, 155 (Ind. Ct. App. 2005), *reh’g denied* (Ind. Ct. App. 2006).

262. *Id.* (quoting IND. CODE § 8-1-1.1-5.1(e) (2005)).

263. *Id.* at 156.

264. *Id.* (citing 170 IND. ADMIN. CODE 1-1.1-17(d) (2005)).

265. *Id.*

266. *Villegas v. Silverman*, 832 N.E.2d 598, 609 (Ind. Ct. App.), *reh’g denied* (Ind. Ct. App. 2005), *trans. dismissed* (Ind. 2006). In this Article the designation AOPA has been used to stand for the Administrative Order and Procedures Act, IND. CODE § 4-21.5 (2005), and ARPA has been used to stand for the Administrative Rules and Procedures Act, IND. CODE § 4-22 (2005).

267. *Villegas*, 832 N.E.2d at 608-09 (citing *Ind. Dep’t of Env’tl. Mgmt. v. Twin Eagle LLC*, 798 N.E.2d 839, 847 (Ind. 2003); *Indiana-Kentucky Elec. Corp. v. Comm’r, Ind. Dep’t of Env’tl. Mgmt.*, 820 N.E.2d 771, 780 (Ind. Ct. App. 2005)).

268. IND. CODE § 4-22-2-3(b) (2005).

269. *Villegas*, 832 N.E.2d at 609 (citing *Blinzinger v. Americana Healthcare Corp.*, 466 N.E.2d 1371 (Ind. Ct. App. 1984)).

found that a rate fee directive adopted by the Indiana Department of Public Welfare was a rule because: (1) it was an agency statement of general applicability to a class; (2) it was applied prospectively to the class; (3) it was applied as though it had the effect of law; and (4) it affected the substantive rights of the class.²⁷⁰

In *Villegas*, the court of appeals found the BMV's new requirements were in fact a rule subject to ARPA, meeting all the requirements set forth in *Blinzinger*.²⁷¹ The requirements were "agency statements of general applicability that are designed to have the effect of law."²⁷² The requirements acted prospectively.²⁷³ The requirements also substantively changed the law because some applicants who were able to obtain a driver license before July 15, 2002 no longer qualified once the new requirements went into effect.²⁷⁴ The Indiana Court of Appeals also found that the new identification requirements did not relate to the BMV's internal policies, procedures, or organization.²⁷⁵ It further stated that "[t]he primary impact of the identification requirements is external and it is the primary impact that is paramount."²⁷⁶

*Indiana-Kentucky*²⁷⁷ followed much the same analysis. IKEC argued that IDEM's ten kilometer rule was unpublished and invalid.²⁷⁸ The affidavit of an IDEM employee submitted in support of summary judgment stated "IDEM requires ambient monitoring for purposes of [the Indiana Administrative Code] to be located no more than ten kilometers from the source of the [sulfur dioxide] emissions."²⁷⁹ The court of appeals agreed that the rule was invalid.²⁸⁰

The Indiana Court of Appeals found that the ten kilometer policy was a rule subject to ARPA because it was "an agency statement of general applicability that is designed to have the effect of law and implements or interprets the Rule" and was not a policy that "relate[d] solely to IDEM's internal policies, procedures, or organization."²⁸¹ Because IDEM did not follow ARPA when it promulgated the rule, it did not have the effect of law and Office of Environmental Adjudication erred in applying the rule against IKEC.²⁸²

270. *Id.* (citing *Blinzinger*, 466 N.E.2d at 1375).

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* (citing *Ind. Dep't of Env'tl. Mgmt. v. AMAX, Inc.*, 529 N.E.2d 1209, 1213 (Ind. Ct. App. 1988)).

277. *Indiana-Kentucky Elec. Corp. v. Comm'r, Ind. Dep't of Env'tl. Mgmt.*, 820 N.E.2d 771 (Ind. Ct. App. 2005).

278. *Id.* at 779.

279. *Id.* (brackets in original).

280. *Id.*

281. *Id.*

282. *Id.*

CONCLUSION

During the survey period, there were several notable cases interpreting Indiana's administrative law. Although the cases are only a snapshot in time, they provide a good introduction to the law for beginning practitioners or a good supplement for those practitioners already familiar with the subject area.

APPELLATE PROCEDURE

KEVIN S. SMITH*

INTRODUCTION

This Article surveys opinions, orders, and other developments in the area of state appellate procedure in Indiana during the most recent reporting period.¹ Part I examines rule amendments affecting Indiana appellate practitioners. Part II discusses matters occurring during the reporting period affecting or relating to matters of appellate procedure and practice. Part III discusses miscellaneous information relevant to Indiana appellate practice and procedure.

I. RULE AMENDMENTS

The changes to the Indiana Rules of Appellate Procedure discussed in subparts A, B, and C, below, were adopted on July 1, 2005, and became effective January 1, 2006.² They were largely the result of suggestions made by the Indiana State Bar Association's Appellate Practice Section.³ The final change, discussed in subpart D, was adopted on October 25, 2005, and took effect immediately.

A. Appellate Rule 12(A)

Appellate Rule 12(A) was clarified to permit trial court clerks to charge a fee for making copies of all or any portion of the Clerk's Record:

Rule 12. Transmittal Of The Record

A. Clerk's Record. Unless the Court on Appeal orders otherwise, the trial court clerk shall retain the Clerk's Record throughout the appeal. A party may request that the trial court clerk copy the Clerk's Record, or a portion thereof, and the clerk shall provide the copies within thirty (30)

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1. This Article resumes where its predecessor, *see* Kevin S. Smith, *Appellate Procedure*, 38 IND. L. REV. 883, 883 n.1 (2005), stopped, covering the time period from October 1, 2004 through September 30, 2005.

2. Order Amending Rules of Appellate Procedure (No. 94S00-0501-MS-19) (Ind. July 1, 2005), *available at* <http://www.in.gov/judiciary/orders/rule-amendments/2005/app-r12;34;44-070105.pdf>.

3. *See* Smith, *supra* note 1, at 886-88.

days, subject to the payment of any usual and customary copying charges.⁴

B. Appellate Rule 34(C)

Appellate Rule 34(C) was amended to extend the length of time for responding to non-routine motions from ten to fifteen days:

Rule 34. Motion Practice

....

(C) Response. Any party may file a response to a motion within ~~ten~~ fifteen (15) days after the motion is served. The fact that no response is filed does not affect the Court's discretion in ruling on the motion.⁵

C. Appellate Rule 44(D) & (E)

Appellate Rule 44 now specifies that transfer or rehearing briefs of intervenors or amici curiae must be limited to either ten pages or 4200 words:

Rule 44. Brief And Petition Length Limitations

....

D. Page Limits. Unless a word count complying with Section E is provided, a brief or Petition may not exceed the following number of pages:

....

Brief of intervenor or amicus curiae on transfer or rehearing: ten (10) pages

....

E. Word Limits. A brief or Petition exceeding the page limit of Section D may be filed if it does not exceed, and the attorney or the unrepresented party preparing the brief or Petition certifies that, including footnotes, it does not exceed, the following number of words:

....

4. Order Amending Rules of Appellate Procedure, *supra* note 2.

5. *Id.*

Brief of intervenor or amicus curiae on transfer or rehearing: 4,200 words⁶

D. Appellate Rule 30(A)

Finally, Appellate Rule 30, which addresses the preparation of transcripts in electronic format, was cosmetically amended to direct practitioners to the appendix to the Rules, where technical standards can be found concerning the preparation of electronic transcripts:

Rule 30. Preparation of Transcript in Electronic Format Only

A. Preparation of Electronic Transcript. In lieu of or in addition to a paper Transcript as set forth in Rule 28, with the approval of the trial court, all parties on appeal, and the Court on Appeal, the court reporter may submit an electronically formatted Transcript in accordance with the following:

....

(3) Technical Standards. Standards for CD-ROM and disk size, formatting, transmission and word processing software shall be determined by the Division of State Court Administration. The Division of State Court Administration shall publish the established standards and distribute copies of such rules to all trial court clerks and Administrative Agencies. See, Appendix. Standards for Preparation of Electronic Transcripts Pursuant to Appellate Rule 30.⁷

II. DEVELOPMENTS IN THE CASE LAW

A. Deadline for Filing Notice of Appeal

Appellate Rule 9(A) requires a party initiating a non-interlocutory appeal to file a Notice of Appeal “within thirty (30) days after *the entry of a Final Judgment*” or, if a party timely files a motion to correct errors, within thirty (30) days after either the court rules on the motion or “the motion is deemed denied.”⁸

6. *Id.*

7. Order Amending Rules of Appellate Procedure (No. 94S00-0501-MS-19) (Ind. Oct. 26, 2005), *available at* <http://www.in.gov/judiciary/orders/rule-amendments/2005/110205-appellate.pdf>. Although this cosmetic addition did not make it into the 2006 “Indiana Rules Of Court—State” book published by Thomson West, the actual appendix to which it refers has been a part of the Appellate Rules appendix for several years and can be found in the 2006 Thomson West book at page 228, or on the Internet at <http://www.in.gov/judiciary/rules/appellate/appellate.doc#appb>.

8. IND. APP. R. 9(A)(1) (emphasis added).

In *Smith v. Deem*,⁹ the court of appeals was called upon to determine what “entry of a Final Judgment”¹⁰ means. The trial court’s order granting summary judgment was signed and file-stamped on June 17; however, the trial court clerk did not enter the judgment in the Record of Judgments and Orders (“RJO”) book until July 30.¹¹ Whether the appellant’s Notice of Appeal was timely depended upon which date constituted the “entry” of the final judgment. The court of appeals’ opinion extensively discussed cases that supported both dates,¹² leading the court to “acknowledge that it is not entirely clear as to which date from which the thirty-day time limit begins to run.”¹³ After reviewing the revisions of the appellate rules in light of the case law,¹⁴ it held that, “as a general proposition, the ‘entry’ mentioned in Appellate Rule 9(A) is entry into the RJO.”¹⁵ The key phrase in the court’s opinion, however, appears to have been “as a general proposition,” because it further held that

[i]n cases where, for whatever reason, there is a delay between the trial court’s rendition of judgment and the entry into the RJO, . . . [and] a party [has] notice of the trial court’s ruling before its entry into the RJO, [then] we see no reason to justify allowing that party to delay filing a Notice of Appeal within thirty days of the date on which the party received notice simply because the clerk has not performed a ministerial task.¹⁶

This holding raises several thorny questions. In each individual case, how will counsel know which date (i.e., the RJO entry date or the date the appellant received notice of the judgment) is applicable? It seems the only way would be either to go on-line to look at the trial court’s docket (if it has an on-line docket), or to call the trial court’s clerk after learning of the final judgment to find out when the clerk entered it in the RJO.

Further, how much “delay” is required before the trigger date switches from the date of entry on the RJO to the date that counsel receives notice of the court’s final judgment? For example, what if the delay is not several weeks, as in *Smith*, but rather is only a matter of days, such as when a clerk mails the trial court’s order on Friday, goes on vacation the next week, and then enters the order in the RJO on the following Monday after returning from vacation? Would the appellant in such an instance use the RJO date or the date, a few days earlier, on which it received “actual notice”? Also, what sort of “notice” is adequate if sufficient delay is found? For example, if the court issues a final judgment in open court, is the judge’s oral ruling enough to constitute “notice” under *Smith*,

9. 834 N.E.2d 1100 (Ind. Ct. App. 2005), *trans. denied* (Ind. 2006).

10. See IND. APP. R. 9(A)(1).

11. *Smith*, 834 N.E.2d at 1102.

12. See *id.* at 1105-08.

13. *Id.* at 1108.

14. See *id.* at 1108-09.

15. *Id.* at 1109.

16. *Id.* at 1110.

or may the appellant wait until it receives the written order in the mail?

Finally, if the date is tied to when the *appellant* receives notice, then how will the appellee know that date so that it knows whether to file a motion to dismiss? The appellee could guess, based on the date the appellee received its notice, but what if the appellant, for whatever reason, receives it on a different date? For example, if the court is in Vanderburgh County, the appellee's counsel is in Vanderburgh County, but the appellant's counsel is in Steuben County and the order is mailed in the middle of December, then there is a very real possibility that the appellant's counsel could receive notice in the mail several days later than the appellee's counsel. Given these questions, the result of this holding seems to be that Indiana is further from a bright line as to when the thirty-day period begins to run for filing the Notice of Appeal than before *Smith*, which may be problematic considering the Notice of Appeal deadline is jurisdictional.¹⁷ A change to Appellate Rule 9(A) may be one way of resolving this problem.

B. Parties on Appeal

During the survey period, the Indiana Supreme Court published an order addressing who is a party on appeal. Specifically, in *Northern Indiana Public Service Co. ("NIPSCO") v. Minniefield*,¹⁸ NIPSCO appealed the judgment of the trial court, but only one of the adverse parties below filed an appellee's brief and participated in the appeal before the court of appeals.¹⁹ When NIPSCO filed a Petition to Transfer, the parties who had not participated in the appeal to that point (Minniefield and Woodson) filed a response. NIPSCO moved to strike their response, arguing Minniefield and Woodson were not "real parties in interest" and failed to participate before the court of appeals.²⁰ The supreme court denied the motion, stating:

Ind. Appellate Rule 17(A) definitively states in relevant part, "A party of record in the trial court . . . shall be a party on appeal," and it is undisputed that Minniefield and Woodson were parties in the litigation before the trial court. Further, nothing in the Indiana Rules of Appellate Procedure precludes an appellee who did not file a brief before the Court of Appeals from seeking or responding to a Petition To Transfer following the Court of Appeals' ruling in the case. Rather, an appellee who does not file a Brief Of Appellee merely risks reversal of the trial court on a showing by the appellant of *prima facie* error, Ind. Appellate Rule 45(D). An appellee could assess the possibility of a showing of *prima facie* error so low as to not be worth the additional time, costs, and legal expenses involved in filing a brief. That same appellee, however,

17. See, e.g., *WW Extended Care, Inc. v. Swinkunas*, 764 N.E.2d 787, 791 (Ind. Ct. App. 2002) ("The timely filing of a notice of appeal is a jurisdictional prerequisite, and failure to conform within the applicable time limits results in forfeiture of the appeal."); IND. APP. R. 9(A)(5).

18. 823 N.E.2d 273 (Ind. 2005) (published order).

19. See *id.* at 273.

20. See *id.*

would have every interest in defending a favorable Court of Appeals' decision if the appellant thereafter sought transfer of jurisdiction to this Court.

Further, when, as here, the appeal involves two appellees, one appellee could reasonably decide the other appellee's brief adequately addresses the issues such that an additional brief is unnecessary, but subsequently determine that the other appellee's Response to the appellant's Petition To Transfer is incomplete and in need of supplementation. Our desire to limit redundant argument and reduce the amount of paper flowing into our Court would be stymied were we to hold that an appellee, to preserve his right to file a Response to a Petition To Transfer, must file a brief before the Court of Appeals.²¹

Similarly, in *AutoXchange.com, Inc. v. Dreyer & Reinbold, Inc.*,²² the appellants filed a motion to strike a brief filed by a party who had been involved in the trial but arguably had no issue in or interests that would be "affected by the outcome of [the] appeal," contending this party had no standing to file a brief.²³ The court of appeals denied the motion, noting that "Appellate Rule 17 clearly states that a party of record in the trial court shall be a party on appeal."²⁴

C. Cross-Appeals

In *Family Video Movie Club, Inc. v. Home Folks, Inc.*,²⁵ the appellant wanted to purchase the building in which the appellee was a tenant. The appellant sent the appellee a written offer to pay the appellee \$35,000 to vacate the premises well before its lease expired.²⁶ Before formal acceptance of the written offer, however, the building burned down. In litigation that followed, the appellee argued, and the trial court agreed, that a valid contract existed requiring the appellant to pay the appellee the \$35,000.²⁷ The appellant appealed, arguing, among other things, that there was no valid contract.²⁸

Despite having succeeded in the trial court, the appellee attempted to cross-appeal, contending the trial court had failed to make a finding of fact that a valid, oral contract existed between the parties.²⁹ The court of appeals dismissed the cross-appeal, holding "[n]o cross-appeal is available in this case because there is no appealable judgment or order against [the appellee]."³⁰ Rather, the appellee

21. *Id.*

22. 816 N.E.2d 40 (Ind. Ct. App. 2004).

23. *Id.* at 44 n.1.

24. *Id.*

25. 827 N.E.2d 582 (Ind. Ct. App. 2005).

26. *See id.* at 583.

27. *Id.*

28. *Id.* at 583-84.

29. *Id.* at 585, 587.

30. *Id.* at 587.

was entitled to “argue the oral agreement as an alternative basis for affirming the trial court’s judgment.”³¹

D. Jurisdiction

1. *Constitutionality of Marriage Statute.*—In *Morrison v. Sadler*,³² the appellants brought a state constitutional challenge against “Indiana’s statutory limitation of marriage to opposite-sex couples.”³³ One of the amici opposed to the appellants’ petition argued “the General Assembly has ‘plenary and exclusive’ authority over the regulation of marriage, with the exceptions of it being prohibited by Article 4, § 22 of the Indiana Constitution from granting ‘special’ divorces and being subject to the requirements of the federal constitution,” such that the issue raised by the appellants was “non-justiciable.”³⁴ The court of appeals disagreed, noting, “We simply cannot accept, for example, that a ban on interracial marriages, while clearly violating the federal constitution, would not even present a justiciable claim under the Indiana Constitution,” and considered the appellants’ claims.³⁵

2. *Calculation of Workers’ Compensation Lien.*—*Tack’s Steel Corp. v. ARC Construction Co.*³⁶ involved an appeal by a third-party defendant from an award of summary judgment requiring it to indemnify a third-party plaintiff concerning a work-related injury.³⁷ On appeal, the appellant asserted it was entitled to a worker’s compensation lien.³⁸ The injured worker conceded a lien was appropriate and that he was responsible for repaying it, but contested the amount.³⁹ The appellant asked the court of appeals “to calculate the lien . . . and allow immediate set-off from its payment to indemnify [the third-party plaintiff].”⁴⁰ The court of appeals found it lacked the jurisdiction to do so, holding that “[w]hen agreement cannot be reached, a declaratory judgment is the appropriate vehicle for determination of the lien amount.”⁴¹

E. Interlocutory Appeals

1. *Orders Held Not Appealable “By Right.”*—Interlocutory appeals essentially fall into one of two categories: those a party may bring “as a matter

31. *Id.*

32. 821 N.E.2d 15 (Ind. Ct. App. 2005).

33. *Id.* at 18.

34. *Id.* at 21 n.5.

35. *Id.*

36. 821 N.E.2d 883 (Ind. Ct. App. 2005).

37. *Id.* at 884-85.

38. *Id.* at 887; *see* IND. CODE § 22-3-2-13 (2005).

39. *Tack’s Steel Corp.*, 821 N.E.2d at 890-91.

40. *Id.* at 891.

41. *Id.* (citing *Dep’t of Pub. Welfare, State of Ind. v. Couch*, 605 N.E.2d 165, 168 (Ind. 1992)).

of right”⁴² and those a party may bring only after securing leave from the trial court and acceptance by the court of appeals.⁴³ During the reporting period, the court of appeals issued two opinions providing further clarification of the rules governing into which category a particular case falls.

In *Whitezel v. Burosh*,⁴⁴ the appellant attempted to bring an interlocutory appeal from an order removing him as a trustee.⁴⁵ Appellate Rule 14(A)(3) states that an interlocutory appeal “as a matter of right” exists from an interlocutory order “[t]o compel the delivery or assignment of any securities, evidence of debt, documents or things in action.”⁴⁶ The parties both contended that the court of appeals had jurisdiction over the appeal pursuant to Appellate Rule 14(A)(3), but the court of appeals disagreed and *sua sponte* dismissed the appeal.⁴⁷ It reasoned that “[t]he matters which are appealable as of right under [Rule 14(A)] involve trial court orders which carry financial and legal consequences akin to those more typically found in final judgments: payment of money, issuance of a debt, delivery of securities, and so on.”⁴⁸ Because the trial court was “simply ordering a new trustee [to] take over management of the Trust” and the “substance of the Trust [was] remaining in the Trust” rather than being sold, the court found the case to fall outside the bounds of Rule 14(A)(3).⁴⁹

In *Rausch v. Finney*,⁵⁰ the appellant, a personal injury plaintiff in an automobile accident case, was ordered by the trial court to execute a medical records release.⁵¹ She sought an interlocutory appeal as a matter of right under Appellate Rule 14(A)(2), which provides for interlocutory appeals of orders “[t]o compel the execution of any document.”⁵² She acknowledged that the court of appeals had already ruled against her position in the 1992 case of *Cua v. Morrison*,⁵³ but contended that the new Appellate Rules, adopted in 2001, overruled *Cua*. The court disagreed, finding that *Cua*’s holding survived the revisions to the appellate rules and that motions to compel the execution of medical records releases are not appealable as a matter of right.⁵⁴

2. *State Does Not Have Right to Interlocutory Appeal in Inverse Condemnation Cases.*—In *Indiana Department of Natural Resources v. Lick Fork*

42. IND. APP. R. 14(A).

43. IND. APP. R. 14(B).

44. 822 N.E.2d 1088 (Ind. Ct. App. 2005).

45. *Id.* at 1089.

46. *Id.* at 1090; IND. APP. R. 14(A)(3).

47. *Whitezel*, 822 N.E.2d at 1091.

48. *Id.* at 1090 (internal quotation marks omitted) (quoting *State v. Hogan*, 582 N.E.2d 824, 825 (Ind.1991)).

49. *Id.* at 1091.

50. 829 N.E.2d 985 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 181 (Ind. 2005).

51. *Id.* at 985.

52. IND. APP. R. 14(A)(2).

53. 600 N.E.2d 951, 953-54 (Ind. Ct. App. 1992).

54. *Rausch*, 829 N.E.2d at 986.

Marina, Inc.,⁵⁵ an inverse condemnation case, the appellee contended the State had waived its right to appeal by failing to bring an interlocutory appeal.⁵⁶ Citing forty-year-old Indiana Supreme Court precedent that held the “State does not have the right to an interlocutory appeal in an inverse condemnation case,”⁵⁷ the court of appeals disagreed with the appellee’s waiver argument and considered the state’s appeal on its merits.⁵⁸

F. Appellate Standard of Review

1. *Summary Judgment Awards.*—In *Beta Steel v. Rust*,⁵⁹ the court of appeals addressed the seemingly contradictory statements that exist in Indiana case law concerning the appellate standard of review for summary judgment awards.⁶⁰ On the one hand, there are cases that state, “The party appealing from a summary judgment decision has the burden of persuading the court that the grant or denial of summary judgment was erroneous.”⁶¹ On the other hand, cases also state, “On appeal from summary judgment, the reviewing court analyzes the issues in the same fashion as the trial court, *de novo*.”⁶² Concerning this seeming contradiction, the court in *Rust* noted, “We can understand why the parties might be confused as to how a trial court ruling can be reviewed *de novo*, while at the same time the appellant has the burden of demonstrating error.”⁶³ The court resolved the matter as follows:

To the extent opinions sometimes say that the appellant bears the burden of persuading the appellate court that the trial court’s summary judgment ruling was erroneous, such burden is largely symbolic and nominal. All trial court rulings should be presumed to be correct, but in the context of summary judgment proceedings we will not hesitate to reverse a trial court’s ruling if it has misconstrued or misapplied the law, failed to consider material factual disputes, or improperly considered immaterial factual disputes. We also give no deference to a trial court’s ability to weigh evidence and judge witness credibility, because no such weighing or judging is permitted when considering a summary judgment motion. Instead, we view the designated evidence independently and with an eye

55. 820 N.E.2d 152 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 745 (Ind.), *cert. denied*, 126 S. Ct. 386 (2005).

56. *Id.* at 156.

57. *Id.* (discussing *Evansville-Vanderburgh Levee Auth. v. Towne Motel, Inc.*, 213 N.E.2d 705, 706 (Ind. 1966)).

58. *Id.*

59. 830 N.E.2d 62 (Ind. Ct. App. 2005).

60. *Id.* at 67-68.

61. *Owens Corning Fiberglass Corp. v. Cobb*, 754 N.E.2d 905, 908 (Ind. 2001); *see also* *Smith*, *supra* note 1, at 902-03 nn.164-65 (discussing cases that state the trial court’s summary judgment decision enters the appellate court “clothed [or cloaked] with a presumption of validity”).

62. *LCEOC, Inc. v. Greer*, 735 N.E.2d 206, 208 (Ind. 2000).

63. *Beta Steel*, 830 N.E.2d at 68.

toward construing it most favorably to the nonmovant.⁶⁴

In *Whinery v. Roberson*,⁶⁵ the court of appeals interpreted the meaning of the term “designated” in the context of the limitation on appellate courts “[w]hen reviewing the grant or denial of a motion for summary judgment, . . . [to] consider only those portions of the pleadings, depositions, or any other matter ‘specifically’ designated to the trial court.”⁶⁶ In *Whinery*, the defendant had moved for judgment on the pleadings, which the plaintiff converted to a summary judgment proceeding by so moving and tendering certain evidence, including deposition transcripts.⁶⁷ The defendant, in making its argument to the trial court, did not rely on the deposition transcript pages. On appeal, the defendant/appellee, in responding to arguments made by the plaintiff/appellant, attempted to cite some of the transcript pages that had been tendered by the plaintiff/appellant below, but the plaintiff/appellant argued the defendant/appellee was precluded from doing so because it had not designated those pages to the trial court.⁶⁸ The court of appeals agreed with the plaintiff/appellant, ruling that because the defendant/appellee did not specifically designate those particular pages to the trial court, the defendant/appellee had forfeited the ability to cite those pages in the Appellee’s Brief, even though those pages had been part of the record below.⁶⁹

2. *Trial Court’s Use of Comity*.—According to Black’s Law Dictionary, “judicial comity” is “[t]he principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect.”⁷⁰ In *In re Arbitration Between American General Financial Services, Inc. and Miller*,⁷¹ the court of appeals determined what standard of appellate review applies when a trial court bases a decision on comity.⁷² Looking to prior precedent and the fact that “comity is a ‘rule of convenience and courtesy,’”⁷³ the court concluded that “‘as a principle which may or may not be applied at the discretion of the trial court, the use of comity should be reviewed for an abuse of that discretion.’”⁷⁴

64. *Id.* (internal citation omitted); *see also Whinery v. Roberson*, 819 N.E.2d 465, 471 (Ind. Ct. App. 2004) (“Though the trial court’s decision is ‘clothed with a presumption of validity,’ a reviewing court faces the same issues that were before the trial court and analyzes them the same way.” (quoting *Kennedy v. Guess, Inc.*, 806 N.E.2d 776, 779 (Ind. 2004)), *trans. dismissed* (Ind. 2006).

65. 819 N.E.2d 465.

66. *Id.* at 471 (emphasis added).

67. *Id.* at 470-71.

68. *Id.* at 471.

69. *Id.* at 471-72.

70. BLACK’S LAW DICTIONARY 183 (6th ed. (abridged) 1991).

71. 820 N.E.2d 722 (Ind. Ct. App. 2005).

72. *See id.* at 724.

73. *Id.* (quoting *Am. Econ. Ins. Co. v. Felts*, 759 N.E.2d 649, 660-61 (Ind. Ct. App. 2001)).

74. *Id.* (quoting Appellant’s Br. at 6).

3. *Appropriateness of Sentence*.—Appellate Rule 7(B) sets out the Indiana appellate courts' authority to "revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."⁷⁵ In *Neale v. State*,⁷⁶ the court of appeals, when discussing Appellate Rule 7(B), paraphrased it in the negative: "A sentence that is authorized by statute will *not* be revised *unless* it is inappropriate in light of the nature of the offense and the character of the offender."⁷⁷ The supreme court took issue with this paraphrase, noting:

While accurate as a matter of logic, *i.e.*, the rule does not authorize a sentence to be revised unless it is inappropriate in light of the nature of the offense and the character of the offender, we believe that phrasing the rule in the negative suggests a greater degree of restraint on the reviewing court than the rule is intended to impose. When we made the change to the language of the rule . . . , we changed its thrust from a prohibition on revising sentences unless certain narrow conditions were met to an authorization to revise sentences when certain broad conditions are satisfied. *Cf.* App. R. 7(B) at 181 (West 2002) (repealed effective Jan. 1, 2001) ("The Court shall not revise a sentence authorized by statute unless the sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.") *with* App. R. 7(B) at 185 (West 2005) ("The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.").⁷⁸

The court then revised the defendant's sentence downward by ten years.⁷⁹

G. Mootness

It is well-known that "Indiana appellate courts' jurisdiction is not limited under the Indiana Constitution to actual cases and controversies," and therefore such courts may decide an arguably moot case on its merits if it involves a question of great public interest that is likely to reoccur.⁸⁰ During the reporting period, the Indiana Court of Appeals found several cases met this threshold. Such cases generally involved either involuntary inpatient commitment to a

75. IND. APP. R. 7(B).

76. 826 N.E.2d 635 (Ind. 2005).

77. *Id.* at 639 (emphasis added) (quoting *Neale v. State*, No. 01A02-0311-CR-983, slip op. at 4 (Ind. Ct. App. June 11, 2004) (unpublished mem.), *vacated by* 826 N.E.2d 635 (Ind. 2005)).

78. *Id.*

79. *Id.* Justice Dickson dissented, "believing the 'due consideration of the trial court's decision' required by Indiana Appellate Rule 7(B) should restrain appellate revision of sentences to only rare, exceptional cases, and that this is not such a case." *Id.* (Dickson, J., dissenting).

80. *Travelers Indem. Co. v. P.R. Mallory & Co.*, 772 N.E.2d 479, 484 (Ind. Ct. App. 2002).

mental health facility,⁸¹ or juvenile delinquency commitments to the Department of Correction.⁸²

H. Stare Decisis in the Court of Appeals

In *Kendall v. State*⁸³ and *Hardister v. State*,⁸⁴ majorities on different Indiana Court of Appeals panels reached opposite results on the same set of facts. Specifically, Kendall and Hardister were co-defendants who were tried jointly but appealed separately. At issue in both appeals was whether the trial court erroneously denied the defendants' motion to suppress evidence. In *Hardister*, the court of appeals reversed the trial court.⁸⁵ In *Kendall*, a majority of a divided panel affirmed.⁸⁶ In doing so, the *Kendall* majority wrote, "The left hand is aware of what the right hand is doing here. The parties never moved to consolidate their appeals, however, and two judges of this panel find themselves unable to agree with the result reached by Hardister's panel."⁸⁷

Kendall and *Hardister* raise an interesting question concerning the extent to which the doctrine of stare decisis applies in the Indiana Court of Appeals. "The doctrine of stare decisis states that, when a court has once laid down a principle of law as applicable to a certain set of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same."⁸⁸ Thus, is the Indiana Court of Appeals a single court bound by the doctrine (similar to a single federal circuit court of appeal, where panels are bound by the prior decisions of other panels⁸⁹), or is each panel free to disregard rulings made by other panels on the same issue (akin to the federal circuit court of appeals system as a whole, where each circuit court of appeals determines the law for the states

81. See *In re Commitment of M.M.*, 826 N.E.2d 90 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 183 (Ind. 2005); *In re Commitment of Steinberg*, 821 N.E.2d 385, 387 n.2 (Ind. Ct. App. 2004).

82. See *D.S. v. State*, 829 N.E.2d 1081, 1083 n.1 (Ind. Ct. App. 2005).

83. 825 N.E.2d 439 (Ind. Ct. App. 2005), *trans. pending*.

84. 821 N.E.2d 912 (Ind. Ct. App.), *trans. granted*, 841 N.E.2d 175 (Ind. 2005).

85. See *id.* at 915.

86. See *Kendall*, 825 N.E.2d at 456.

87. *Id.* at 451 n.9.

88. *Emerson v. State*, 812 N.E.2d 1090, 1099 (Ind. App. Ct. 2004).

89. See, e.g., *Eulitt ex rel. Eulitt v. Maine, Dep't of Educ.*, 386 F.3d 344, 349 (1st Cir. 2004) ("Ordinarily, newly constituted panels in a multi-panel circuit should consider themselves bound by prior panel decisions. This rule is a specialized application of the stare decisis principle." (internal citations omitted)); *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 197 (D.C. Cir. 1996) (stating that panel was bound to follow prior published opinions of the D.C. Circuit); *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) ("We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court."); 6TH CIR. R. 206(c) ("Reported panel opinions are binding on subsequent panels."); 3D CIR. INTERNAL OP. P. 9.1 ("It is the tradition of this court that the holding of a panel in a precedential opinion is binding on subsequent panels.").

within that circuit and is not bound by precedent issued by other circuits⁹⁰)?

In *Diesel Construction Co. v. Cotten*,⁹¹ the Indiana Court of Appeals was faced with conflicting opinions issued by its First and Fourth Districts. One of the parties argued that the panel hearing the case, made up of First District judges, should apply First District precedent and disregard conflicting Fourth District precedent, “imparting that [First District judges were] not bound by decisions from [the] other districts.”⁹² “Contrary to [the party’s] misapprehension,” the panel responded, “the decisions of all five appellate districts are law governing all of Indiana, not just the district from which the decision was issued. Thus, we cannot simply disregard them.”⁹³ Similarly, in *State ex rel. Shortridge v. Court of Appeals of Indiana*,⁹⁴ the Indiana Supreme Court stated, with regard to the court of appeals being divided into separate districts, that “[n]either the Constitution nor the General Assembly provides for . . . separate and independent courts [based on districts].”⁹⁵ Rather, “the jurisdiction of the [court of appeals is] according to subject matter and imposed sentence, not according to particular geographic districts or particular judges or panels of judges,” and therefore jurisdiction “lies with the court as a whole, not with the statutorily-designated districts or the judges thereof.”⁹⁶ Because the court of appeals is a single court whose various panels issue decisions binding on all lower Indiana courts, these cases would seem to suggest that the court of appeals is more analogous to a single federal circuit court of appeals, and therefore, for consistency, uniformity, and clarity, stare decisis should bind a court of appeals panel’s decision to the same extent it binds a decision rendered by a panel within a federal circuit court.

On the other hand, two aspects of the Indiana Appellate Rules seem to suggest the court of appeals is more analogous to the federal circuit court of appeals system as a whole rather than a single circuit court of appeals. First, one stated ground for transfer to the Indiana Supreme Court is that “[t]he Court of Appeals has entered a decision in conflict with another decision of the Court of Appeals on the same important issue.”⁹⁷ This seems to imply that a court of appeals panel is not required to follow a preceding decision by a different court of appeals’ panel (although admittedly the word “panel” does not appear in the rule’s text), and parallels the “circuit split” ground for a grant of certiorari to the

90. See, e.g., *Abdulai v. Ashcroft*, 239 F.3d 542, 553 n.7 (3d Cir. 2001) (stating the Third Circuit panel is not bound by decisions of other United States Circuit Courts of Appeals); *U.S. v. Phillips*, 210 F.3d 345, 352 n.4 (5th Cir. 2000) (same); *U.S. v. Brame*, 997 F.2d 1426, 1428 (11th Cir. 1993) (same).

91. 634 N.E.2d 1351 (Ind. Ct. App. 1994).

92. *Id.* at 1354.

93. *Id.*

94. 468 N.E.2d 214 (Ind. 1984).

95. *Id.* at 216.

96. *Id.*

97. IND. APP. R. 57(H)(1).

United States Supreme Court.⁹⁸ Second, there is no provision in our appellate rules for the Indiana Court of Appeals to review one of its panel's decision en banc. The Federal Rules of Appellate Procedure, on the other hand, specifically contemplate en banc review when a circuit panel's decision conflicts with prior precedent within that same circuit so that en banc decision resolving the conflict may "secure and maintain uniformity of the [circuit] court's decisions."⁹⁹ Thus, the placement of responsibility for resolving conflicting court of appeals' precedent in the supreme court, combined with the absence of any mechanism for en banc court of appeals review of conflicting panel opinions, suggests the court of appeals' panels are more analogous, in terms of autonomy and stare decisis, to the various federal circuit courts of appeal, rather than a single federal circuit court.

Procedurally and practically, there are likely pros and cons to each model, a discussion of which is well beyond the scope of this Article. The irreconcilable decisions in *Kendall* and *Hardister* during this reporting period, however, may indicate that the time has come for such a discussion among Indiana appellate court jurists and pundits.

I. Attorneys' Fees and Costs on Appeal

1. When Is an Appellate Decision "Final" for Purposes of Filing a Motion for Costs?—To secure appellate costs, the victorious party must file a motion "within sixty (60) days after the final decision of the Court of Appeals or Supreme Court."¹⁰⁰ In *Rogers Group, Inc. v. Diamond Builders, LLC*,¹⁰¹ the court of appeals interpreted the meaning of "final" in this context.¹⁰² Specifically, the court of appeals issued its decision in the appellant's favor on October 7, 2004. The appellee sought transfer, which the supreme court denied on March 10, 2005. The appellant filed a motion for costs on April 26, 2005, well within the time limit if the sixty-day period began to run on March 10, 2005, but well outside that time limit if the period began to run on October 7, 2004.¹⁰³ The appellee argued the motion was untimely, contending that because Appellate Rule 58(B) states the "denial of a Petition to Transfer shall have no legal effect other than to terminate the litigation between the parties in the Supreme Court,"¹⁰⁴ the sixty-day period began to run when the court of appeals issued its decision on October 7, 2004, rather than when the supreme court denied

98. See, e.g., SUP. CT. R. 10(a) (stating certiorari may be granted where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

99. FED. R. APP. P. 35(b)(1)(A).

100. IND. APP. R. 67(A).

101. 833 N.E.2d 475 (Ind. Ct. App. 2005).

102. See *id.* at 476-77.

103. See *id.*

104. See IND. APP. R. 58(A).

transfer.¹⁰⁵ The court of appeals disagreed, interpreting the word “final” to mean the date on which the Clerk of Courts certifies an opinion as “final” under Appellate Rule 65(E).¹⁰⁶ “It makes little sense,” the court wrote, “for a party to seek appellate costs if the decision on which the party seeks costs is later reversed or modified on rehearing or transfer.”¹⁰⁷

This is an important ruling for appellate practitioners to understand. The issue presented was whether the transfer denial date or the date the court of appeals’ decision is handed down triggered the start of the limitations period for filing a motion for costs. The court of appeals effectively held “neither,” because the date on which the clerk certifies an opinion as final is typically about thirty or more days *after* the supreme court issues its order denying transfer.¹⁰⁸ Further, because the certification notice goes only to the trial court or administrative agency from which the appeal came,¹⁰⁹ parties will have to check the clerk’s on-line docket or phone the clerk’s office to find out the actual date on which an opinion is certified as final.

2. *Contract Trumps Appellate Rule 67 Concerning Appellate Costs.*—In *Walton v. Claybridge Homeowners Ass’n*,¹¹⁰ the appellant argued the appellee was not entitled to costs incurred during the appellate process because the appellant had failed to file a motion for appellate costs within sixty days of the court of appeals’ decision.¹¹¹ The court of appeals rejected this argument because “the costs in this case were sought under a provision of the [declaration of covenants and rights between the parties, or “DCR”], which has been recognized as a form of contract. Thus, the DCR, not the appellate rule, governed the [appellee’s] right to recover costs.”¹¹²

J. Waiver

1. “Void” Versus “Voidable” Orders.—In *In re Paternity of P.E.M.*,¹¹³ the appellant contended the trial court could not use a 2003 order to reaffirm a ruling made in a 2001 order because the 2001 order was void for failing to contain

105. *Rogers Group, Inc.*, 833 N.E.2d at 476.

106. *Id.* at 477.

107. *Id.*

108. *See id.*; IND. APP. R. 65(E) (“The Clerk shall certify the opinion or memorandum decision to the trial court or Administrative Agency only after the time for all Petitions for Rehearing, Transfer, or Review has expired”); IND. APP. R. 54(B) (stating Petition for Rehearing is due “no later than thirty (30) days after the decision”); IND. APP. R. 57(C) (stating Petition to Transfer is due “no later than thirty (30) days” after the court of appeals’ adverse decision or disposition of a Petition for Rehearing).

109. *See* IND. APP. R. 65(E).

110. 825 N.E.2d 818 (Ind. Ct. App. 2005).

111. *Id.* at 823; *see* IND. APP. R. 67(A).

112. *Walton*, 825 N.E.2d at 823-24 (internal citation omitted).

113. 818 N.E.2d 32 (Ind. Ct. App. 2004).

necessary findings of fact and conclusions of law.¹¹⁴ The court of appeals agreed that the 2001 order was deficient, but found the deficiency made the order “voidable” rather than “void.”¹¹⁵ Because the appellant did not raise the deficiency of the 2001 order in his first appeal, he had forfeited his ability to challenge the 2001 order directly and could not avoid that forfeiture by collaterally attacking the 2001 order through a challenge to the 2003 order.¹¹⁶

2. *Issues Considered on Appeal That Were Not Raised in Trial Court.*—Normally, a party’s failure to raise an issue in the trial court waives its ability to raise the issue on appeal.¹¹⁷ In a couple of cases, however, the court of appeals elected to consider such issues anyway.

In *Save the Valley, Inc. v. Indiana-Kentucky Electric Corp.*,¹¹⁸ the Indiana Department of Environmental Management (“IDEM”) had renewed Indiana-Kentucky Electric Corporation’s (“IKEC’s”) license to operate a coal ash landfill.¹¹⁹ Several groups challenged this. At the administrative level, IKEC challenged the groups’ standing to bring their claim, but IDEM did not. On appeal, IDEM attempted to raise the standing issue and the groups objected, citing IDEM’s failure to raise the issue below. The court of appeals allowed IDEM to proceed, even though it was raising the issue for the first time on appeal, because the groups had fair notice of the issue and an opportunity to defend it at the administrative level.¹²⁰

In *Highler v. State*,¹²¹ Highler objected to the prosecution’s use of a peremptory challenge to strike an African-American minister from the venire, but only on the ground that the strike was racially discriminatory.¹²² On appeal, he attempted to argue that the peremptory challenge violated constitutional requirements because it was based on the potential juror’s religious affiliation.¹²³ The court of appeals agreed to consider the issue, although normally it would have been waived, because the court of appeals found the issue to be “of importance.”¹²⁴ It also observed that the State had failed to make any waiver claim and instead had responded to the issue on its merits.¹²⁵

3. *“Waiver” Versus “Forfeiture.”*—In *Smylie v. State*,¹²⁶ the supreme court,

114. *See id.* at 36.

115. *See id.* at 37.

116. *See id.* at 36-37.

117. *See, e.g., In re Estate of Highfill*, 839 N.E.2d 218, 223 n.2 (Ind. Ct. App. 2005), *reh’g denied* (Ind. Ct. App. 2006); *Ryan v. Brown*, 827 N.E.2d 112, 118 (Ind. Ct. App. 2005).

118. 820 N.E.2d 677 (Ind. Ct. App.), *on reh’g*, 824 N.E.2d 776 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 179 (Ind. 2005).

119. *See id.* at 678.

120. *Id.* at 679 n.3.

121. 834 N.E.2d 182 (Ind. Ct. App.), *trans. granted*, 841 N.E.2d 191 (Ind. 2005).

122. *See id.* at 186.

123. *See id.* at 193-94.

124. *Id.* at 193 n.8.

125. *Id.*

126. 823 N.E.2d 679 (Ind.), *cert. denied*, 126 S. Ct. 545 (2005).

citing federal precedent, clarified the difference between “waiver” and “forfeiture.” The court wrote:

These terms are often used somewhat interchangeably, but they deal with distinct categories of non-appealable issues. Waiver indicates an “intentional relinquishment or abandonment of a known right.” In contrast, forfeiture occurs when a party fails “to make the timely assertion of a right.” Furthermore, while waiver generally precludes appellate review of an issue, in federal practice forfeiture permits appellate review, but limits such review to “plain error.”¹²⁷

4. *Appellate Rule 48 May Not Be Used to Preserve Issue Not Raised in Appellant’s Brief.*—In *Chupp v. State*,¹²⁸ the appellant failed to raise a claim that arguably was available to him at the time his appellant’s brief was filed. Rather than seeking to amend his brief, however, he attempted to submit a case in support of his argument as “supplemental authority” under Appellate Rule 48.¹²⁹ The court of appeals rejected a reading of the rule that would allow such a tactic and found the argument forfeited, stating:

Surely it is not the intention of Appellate Rule 48 to allow a party who failed to present an issue in his appellant’s brief to bypass the general rule that un-raised issues may not be presented for the first time in a reply brief by filing a citation to additional authority. Instead, as we read the Rule, where a party has properly presented an issue, he may supplement his brief by providing citations to additional authority to support the argument previously raised.¹³⁰

5. *Appellate Court May Affirm the Trial Court’s Judgment on Any Theory Supported by the Record . . . Except Standing.*—It has long been the law in Indiana that an appellate court may affirm a trial court’s judgment on any theory supported by the evidence in the appellate record.¹³¹ This general rule may conflict, however, with a more specific rule that says the State may not challenge a defendant’s standing to contest the constitutional validity of a search for the first time on appeal.¹³² In *Edwards v. State*,¹³³ the court of appeals resolved this conflict in favor of the defendant, holding the State may challenge a defendant’s standing on appeal only if it did so below, even if the standing issue is an otherwise viable reason to affirm a trial court’s judgment finding a search to be

127. *Id.* at 688 n.13 (internal citations omitted).

128. 830 N.E.2d 119 (Ind. Ct. App. 2005).

129. *Id.* at 125-26.

130. *Id.* at 126.

131. *Ratliff v. State*, 770 N.E.2d 807, 809 (Ind. 2002); *see, e.g., Jester v. State*, 724 N.E.2d 235, 240 (Ind. 2000); *Dowdell v. State*, 720 N.E.2d 1146, 1152 (Ind. 1999); *Yanoff v. Muncy*, 688 N.E.2d 1259, 1262 (Ind. 1997); *Light v. State*, 547 N.E.2d 1073, 1081 (Ind. 1989).

132. *See, e.g., Everroad v. State*, 590 N.E.2d 567, 569 (Ind. 1992); *Tumblin v. State*, 736 N.E.2d 317, 320-21 (Ind. Ct. App. 2000).

133. 832 N.E.2d 1072 (Ind. Ct. App. 2005).

constitutionally valid.¹³⁴

K. Problematic Appellate Performance

This survey period, as in previous years, saw several appeal-related problems deemed serious enough by the reviewing tribunal to warrant published comment. Many of those instances are discussed below.

1. *Contents of Briefs and Petitions.*—The survey period again saw repeated problems with appellate briefs, particularly concerning failing to include a table of authorities,¹³⁵ arguing facts not supported by the record evidence,¹³⁶ failing to use pinpoint citations,¹³⁷ failing to keep the Summary of the Argument “succinct,”¹³⁸ failing to give each argument within the brief’s “argument” section its own separate heading,¹³⁹ missing Statements of Facts,¹⁴⁰ missing Statements of the Case,¹⁴¹ and improper Statements of Fact or Statements of the Case (argumentativeness),¹⁴² failing to state the facts in the manner commensurate with the applicable standard of review,¹⁴³ failing to state the standard of review,¹⁴⁴ reproducing the trial court’s findings of fact in lieu of a written Statement of Facts,¹⁴⁵ failing to include necessary facts or proper record citations,¹⁴⁶ missing

134. *Id.* at 1074-75.

135. *Montgomery v. Bd. of Trs. of Purdue Univ.*, 824 N.E.2d 1278, 1279 n.3 (Ind. Ct. App.), *trans. granted*, 841 N.E.2d 181 (Ind. 2005); *LTL Truck Serv., LLC v. Safeguard, Inc.*, 817 N.E.2d 664, 670 n.3 (Ind. Ct. App. 2004).

136. *Pelak v. Ind. Indus. Servs., Inc.*, 831 N.E.2d 765, 774 nn.10-11 (Ind. Ct. App.), *reh’g denied* (Ind. Ct. App. 2005), *trans. denied* (Ind. 2006); *Long v. Barrett*, 818 N.E.2d 18, 22 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 743 (Ind. 2005).

137. *Goodwine v. Goodwine*, 819 N.E.2d 824, 828 n.2 (Ind. Ct. App. 2004).

138. *Troxel Equip. Co. v. Limberlost Bancshares*, 833 N.E.2d 36, 37 n.1 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 189 (Ind. 2005).

139. *Darling v. Martin*, 827 N.E.2d 1199, 1202 n.2 (Ind. Ct. App.), *reh’g denied* (Ind. Ct. App. 2005).

140. *Allstate Ins. Co. v. Hennings*, 827 N.E.2d 1244, 1246 n.1 (Ind. Ct. App. 2005).

141. *Black v. State*, 829 N.E.2d 607, 609 n.1 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 185 (Ind. 2005).

142. *Fuerst v. Review Bd. of Ind. Dep’t of Workforce Dev.*, 823 N.E.2d 309, 310 n.1 (Ind. Ct. App. 2005).

143. *Id.*

144. *Mullins v. Parkview Hosp., Inc.*, 830 N.E.2d 45, 59 n.8 (Ind. Ct. App.), *reh’g denied* (Ind. Ct. App. 2005), *reh’g denied* (Ind. Ct. App. 2006), *trans. pending*; *Montgomery v. Bd. of Trs. of Purdue Univ.*, 824 N.E.2d 1278, 1279 n.3 (Ind. Ct. App.), *trans. granted*, 841 N.E.2d 181 (Ind. 2005).

145. *Gen. Motors Corp. v. Sheets*, 818 N.E.2d 49, 51 n.1 (Ind. Ct. App. 2004), *trans. denied* (Ind. 2005).

146. *Allstate Ins. Co. v. Hennings*, 827 N.E.2d 1244, 1246 n.1 (Ind. Ct. App. 2005); *Kendall v. State*, 825 N.E.2d 439, 444 n.2 (Ind. Ct. App. 2005); *Montgomery*, 824 N.E.2d at 1279 n.3; *Smith v. State*, 822 N.E.2d 193, 204 n.7 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 741 (Ind. 2005).

Statement of the Case,¹⁴⁷ etc.). Indeed, in *Johnson v. State*,¹⁴⁸ the court of appeals expressed frustration with the appellant's counsel's repeated failure to provide compliant Statements of Facts. It wrote:

We remind Johnson's counsel, *as we have on numerous prior occasions*, that a statement of the facts in an Appellant's Brief is *not to be a witness by witness summary of the evidence presented at trial*. Rather, it is to be a concise statement of the facts in the light most favorable to the judgment. *The statement should tell a coherent story, which Johnson's statement wholly fails to do.*¹⁴⁹

The most recurrent briefing problem this year, however, was appellants failing "to include any written opinion, memorandum of decision or findings of fact and conclusions thereon relating to the issues raised on appeal" or, in criminal cases "a copy of the sentencing order," in their Appellant's Briefs.¹⁵⁰

2. *Appendices*.—There were also several problems noted again this year with appellate appendices, including failing to file appendices,¹⁵¹ failing to include documents in the appendices necessary for the appellate court's review of the trial court's ruling,¹⁵² failing to number the appendix pages,¹⁵³ and

147. *Lewis v. Rex Metal Craft, Inc.*, 831 N.E.2d 812, 815 n.1 (Ind. Ct. App. 2005).

148. 831 N.E.2d 163 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 183 (Ind. 2005).

149. *Id.* at 166 n.2 (emphasis added) (citing IND. APP. R. 46(A)(6)(c)).

150. IND. APP. R. 46(A)(10); *see, e.g.*, *Citizens Fin. Servs. v. Innsbrook Country Club, Inc.*, 833 N.E.2d 1045, 1046 n.2 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App. 2005); *Schmidt v. Mut. Hosp. Servs., Inc.*, 832 N.E.2d 977, 979 n.3 (Ind. Ct. App. 2005); *Johnson*, 831 N.E.2d at 167 n.3; *Stokes v. State*, 828 N.E.2d 937, 939 n.5 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 182 (Ind. 2005); *Bloomington Country Club, Inc. v. City of Bloomington Water & Wastewater Utils.*, 827 N.E.2d 1213, 1218 n.1 (Ind. Ct. App. 2005); *In re Paternity of H.J.B.*, 829 N.E.2d 157, 158 n.1 (Ind. Ct. App. 2005); *McLemore v. McLemore*, 827 N.E.2d 1135, 1138 n.1 (Ind. Ct. App. 2005); *Illiana Surgery & Med. Ctr., LLC v. STG Funding, Inc.*, 824 N.E.2d 388, 392 n.1 (Ind. Ct. App. 2005); *Fuerst v. Review Bd. of Ind. Dep't of Workforce Dev.*, 823 N.E.2d 309, 312 n.2 (Ind. Ct. App. 2005); *In re Sale of Real Prop. with Delinquent Taxes or Special Assessments*, 822 N.E.2d 1063, 1065 n.1 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 179 (Ind. 2005); *Bloomington Area Arts Council v. Dept. of Workforce Dev., Unemployment Ins. Appeals*, 821 N.E.2d 843, 845 n.1 (Ind. Ct. App. 2005); *State v. Jones*, 819 N.E.2d 877, 879 n.7 (Ind. Ct. App. 2004); *Metro. Sch. Dist. of Lawrence Twp. v. M.S.*, 818 N.E.2d 978, 979 n.2 (Ind. Ct. App. 2004); *Barclay v. State Auto Ins. Cos.*, 816 N.E.2d 973, 974 n.1 (Ind. Ct. App. 2004), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 745 (Ind. 2005); *Combs v. Tolle*, 816 N.E.2d 432, 433 n.1 (Ind. Ct. App. 2004).

151. *Gibbon v. Estate of Gibbon*, 829 N.E.2d 27, 28 n.1 (Ind. Ct. App. 2005); *Fuerst*, 823 N.E.2d at 310 n.1.

152. *Citizens Fin. Servs.*, 833 N.E.2d at 1046 n.2; *Rembert v. State*, 832 N.E.2d 1130, 1131 n.2 (Ind. Ct. App. 2005); *Cortez v. Jo-Ann Stores, Inc.*, 827 N.E.2d 1223, 1227 n.1 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App. 2005); *LTL Truck Serv., LLC v. Safeguard, Inc.*, 817 N.E.2d 664, 670 n.3 (Ind. Ct. App. 2004).

153. *Everage v. N. Ind. Pub. Serv. Co.*, 825 N.E.2d 941, 943 n.1 (Ind. Ct. App. 2005).

including improper documents that were not designated to the trial court in the appendix.¹⁵⁴ Indeed, the latter problem resulted in one appendix being stricken in its entirety¹⁵⁵ and others having significant portions stricken.¹⁵⁶

The failure to include necessary documents in an appendix can result in dismissal of the appeal or an adverse ruling on the merits against the party who failed to include the necessary document.¹⁵⁷ In *Glasscock v. Corliss*,¹⁵⁸ however, it did not. The issue surrounded the alleged excessiveness of a jury verdict, which, to be preserved for appeal, must have been challenged in the trial court by a motion to correct error.¹⁵⁹ Although the trial court's chronological case summary showed the appellant had filed a motion to correct error, he had not included it in his appendix; therefore, the court could not determine the motion's contents to see if the issue had been preserved.¹⁶⁰ Because the appellee had failed to argue that the issue was waived, however, the court "assume[d the issue] was properly preserved and address[ed] its merits."¹⁶¹

A similar result occurred in *Kelly v. Levandoski*,¹⁶² which involved an appeal from a grant of summary judgment. The appellant included in his appendix only the documents he had designated to the trial court, rather than all the documents designated by both parties.¹⁶³ Noting that the appellant's appendix is required to "contain . . . copies of . . . pleadings and other documents from the Clerk's Record in chronological order that are necessary for resolution of the issues raised on appeal,"¹⁶⁴ the court of appeals acknowledged it recently had dismissed two appeals for this type of rule violation.¹⁶⁵ In this case, however, it chose not to dismiss the appeal, in part because the appellee had submitted the missing documents in its own appendix.¹⁶⁶ This result raises serious questions of strategy

154. *Binder v. Benchwarmers Sports Lounge*, 833 N.E.2d 70, 73 n.1 (Ind. Ct. App. 2005); *Shepherd v. Truex*, 823 N.E.2d 320, 322 n.1 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App. 2005); *Ind. Bus. Coll. v. Hollowell*, 818 N.E.2d 943, 952 n.5 (Ind. Ct. App. 2004); *Long v. Barrett*, 818 N.E.2d 18, 22 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 743 (Ind. 2005).

155. *See Ind. Bus. Coll.*, 818 N.E.2d at 952 n.5.

156. *See Binder*, 833 N.E.2d at 73 n.1; *Shepherd*, 823 N.E.2d at 322 n.1.

157. *See, e.g., Yoquelet v. Marshall County*, 811 N.E.2d 826, 827-30 (Ind. Ct. App. 2004); *Hughes v. King*, 808 N.E.2d 146, 147-48 (Ind. Ct. App. 2004).

158. 823 N.E.2d 748 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 183 (Ind. 2005).

159. *Id.* at 757 n.5 (citing IND. TRIAL R. 59(A)(2)).

160. *Id.*

161. *Id.*; *see also Schrenger v. Caesars Ind.*, 825 N.E.2d 879, 881 n.5 (Ind. Ct. App.) (noting that both parties had failed to include indispensable documents in their respective appendices, but addressing the merits anyway because "neither party appears to dispute the facts"), *trans. denied*, 841 N.E.2d 178 (Ind. 2005).

162. 825 N.E.2d 850 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 179 (Ind. 2005).

163. *Id.* at 856.

164. *Id.* (quoting IND. APP. R. 50(A)(2)(f)).

165. *See id.* (citing *Yoquelet v. Marshall County*, 811 N.E.2d 826, 830 (Ind. Ct. App. 2004); *Hughes v. King*, 808 N.E.2d 146, 148 (Ind. Ct. App. 2004)).

166. *Id.*

that appellees must consider when faced with similar situations in the future. On the one hand, by submitting the necessary documents in an appellee's appendix, the appellee may ruin its chance for getting the appeal dismissed. On the other hand, if the appellee fails to submit the documents, will it risk losing the appeal on the merits if the court considers the merits without the appellee's necessary documents?

Finally, in *Rembert v. State*,¹⁶⁷ the court again showed leniency to an appellant who violated the Appellate Rules by failing to include a table of contents and a critical document in the appendix, going so far as to procure the necessary document from the trial court rather than dismiss the appeal¹⁶⁸ as it did in other cases.¹⁶⁹ The court wrote:

Counsel's failure to provide an adequate table of contents impeded our review, as we had to pore through the appendix to determine which documents he had provided and where we might find them. As noted below, at least one document of substantial importance, Rembert's pre-sentence report, was conspicuous by its absence from the appendix. While we chose to obtain that information from the trial court, we remind Rembert's counsel it is an appellant's obligation to provide us with an adequate record that clearly shows the alleged error of which he complains. We admonish counsel to provide a complete appendix with a usable table of contents in future appeals brought before this court.¹⁷⁰

3. *Oral Argument*.—In *Schriber v. Anonymous*,¹⁷¹ the Indiana Supreme Court heard oral argument on a petition to transfer. During the oral argument, the attorneys on both sides provided evasive, non-responsive answers to direct questions from the panel.¹⁷² Chief Justice Shepard responded with the following statement to the appellee's counsel:

This has been a very bad morning. . . . We've spent thirty-five minutes in which a variety of the members of this Court asked you and [opposing counsel] rather ordinary questions . . . and get what appear to me to be intentional refusals to answer. . . . Justice Sullivan has asked you a very simple question. He's asked it three times. . . . I only conclude from that sort of response that . . . a direct answer to his question is adverse to your position. That's the inference I draw when a lawyer does that. . . . I'm not really sure which one of you has been more obstinate. . . . But,

167. 832 N.E.2d 1130 (Ind. Ct. App. 2005).

168. *Id.* at 1131 n.2.

169. *See, e.g.*, cases cited at *supra* note 165.

170. *Rembert*, 832 N.E.2d at 1131 n.2 (internal citation omitted).

171. 810 N.E.2d 1119 (Ind. Ct. App. 2004), *vacated by* No. 49S04-0501-CV-30, 2006 WL 999969 (Ind. Apr. 18, 2006).

172. *See generally* Indiana Supreme Court Oral Argument in *Schriber v. Anonymous* (March 10, 2005, at 9 a.m.), *available at* <http://www.indianacourts.org/apps/webcasts/default.aspx?view=table&yr=2005&court= SUP&sort=&page=5>.

unless you have an answer, and so far you have steadfastly refused to give one, I conclude that . . . the answer in your own mind is a negative. And if you have a positive, it would be to your client's benefit to offer it up.¹⁷³

The take-away for appellate practitioners is to realize that by failing to address tough questions directly, you leave the panel believing the "real" answer, which you appear to be avoiding at all costs, to be one detrimental to your case. Thus, your failure to answer a question might itself be an "answer," but likely not the one you want to give the court.

Also, if practitioners have an oral argument before the Indiana Supreme Court and wish to watch their performance later, they can do so by logging onto the court's website.¹⁷⁴ Since 2001, the court has been archiving videotaped recordings of its oral arguments on its website, a point of which the court reminded citizens in a footnote in *Advantage Home Health Care, Inc. v. Indiana State Department of Health*.¹⁷⁵ Oral arguments are also available live on the website.¹⁷⁶

4. *Candor to the Tribunal*.—As has been noted in this survey article previously,¹⁷⁷ the "baffling"¹⁷⁸ problem of litigants making claims about the record or precedent that the record or precedent do not support continued this survey period. In *Binder v. Benchwarmers Sports Lounge*,¹⁷⁹ the court of appeals "admonish[ed] Binder's counsel to pay closer attention to [Indiana's] appellate rules and his duties, particularly with regard to the accuracy of his [appendix] verification, as an officer of the court."¹⁸⁰ In *Milligan v. State*,¹⁸¹ the court of appeals, after noting that "[t]he State's references to the transcript do not support its assertions," "remind[ed] the State's counsel of his duty of candor toward the tribunal."¹⁸² In *Indiana Family & Social Services Administration v. Ace Foster Care & Pediatric Home Nursing Agency Corp.*,¹⁸³ the court criticized appellee's counsel for citing a court of appeals' opinion that had been vacated by a supreme court grant of transfer, "thereby negating its precedential value."¹⁸⁴ The court

173. *Id.* at 31:33-32:38.

174. See Indiana Courts, Oral Arguments Online, <http://www.indianacourts.org/apps/webcasts/> (last visited June 13, 2006).

175. See 829 N.E.2d 499, 502 n.2 (Ind. 2005).

176. See *supra* note 174.

177. See Smith, *supra* note 1, at 908; Douglas E. Cressler, *Appellate Procedure*, 36 IND. L. REV. 935, 949-50 & n.106 (2003); Douglas E. Cressler & Paula F. Cardoza, *A New Era Dawns in Appellate Procedure*, 34 IND. L. REV. 741, 776 & n.374 (2001).

178. Smith, *supra* note 1, at 908.

179. 833 N.E.2d 70 (Ind. Ct. App. 2005).

180. *Id.* at 73 n.1

181. 819 N.E.2d 115 (Ind. Ct. App. 2004).

182. *Id.* at 118 n.6 (citing IND. RULES OF PROF'L CONDUCT R. 3.3).

183. 823 N.E.2d 1199 (Ind. Ct. App. 2005).

184. *Id.* at 1204 n.5.

“remind[ed] [the appellee’s] counsel of their duty of candor toward the tribunal under Indiana Professional Conduct Rule 3.3 and admonish[ed] them to check citations more carefully in the future.”¹⁸⁵ This case serves to remind all practitioners of the importance of “Shepardizing” all citations in briefs and motions.

5. *Incivility*.—The recurring problem of incivility continued to rear its ugly head this survey period, again drawing censure from the court of appeals. In *Tobin v. Ruman*,¹⁸⁶ the court noted that the appellant’s briefs were “filled with unnecessarily hostile descriptions of the opposing parties and the trial court.”¹⁸⁷ After listing examples, the court stated that “[t]he generally offensive and inflammatory tone of the briefs does little to advance [the appellant’s] position,” and “caution[ed the appellant] . . . to adopt a more professional, appropriate, and respectful tone in all of his dealings with courts of law and other members of the legal profession in the future or face appropriate sanctions.”¹⁸⁸

*Crosson v. Berry*¹⁸⁹ also involved attorneys who could not maintain professional levels of civility. The court wrote:

In her reply brief, Crosson moved to strike Berry’s brief, and she suggested that “this case presents an opportunity for the Court to remind attorneys of . . . their responsibility to maintain the dignity and reputation of the profession.” We hereby deny Crosson’s motion to strike Berry’s brief but would suggest that *the parties to this appeal, both of whom are attorneys, are the ones who need the reminder of the responsibility to maintain the dignity and reputation of the legal profession.*¹⁹⁰

Judge Baker wrote a separate concurrence specifically to expound upon the majority’s admonition and express his displeasure over what he viewed as a frivolous appeal. He wrote:

I fully concur in the majority opinion. However, I write separately to highlight what the majority observed in the first footnote—the parties’ responsibility to maintain the dignity and reputation of the legal profession.

This matter should have been laid to rest when the Monroe County jury essentially told Crosson and Berry to put this litigation behind them by finding for Berry on the malicious prosecution claim but awarding him no damages. . . . In my view, by appealing this case that clearly should

185. *Id.*

186. 819 N.E.2d 78 (Ind. Ct. App. 2004), *reh’g denied* (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 747 (Ind. 2005).

187. *Id.* at 81 n.2.

188. *Id.*

189. 829 N.E.2d 184 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 186 (Ind. 2005).

190. *Id.* at 187 n.1 (emphasis added).

have ended with the jury verdict, if not sooner, Crosson is now maintaining a frivolous, unreasonable, and groundless action. As such, I would remand this cause to the trial court for an award of attorney's fees to Berry for the maintenance of this action since the jury verdict, including the litigation of this appeal.¹⁹¹

Professor Crosson did not heed Judge Baker's advice, instead continuing the litigation by filing a petition to transfer, which the Indiana Supreme Court denied.¹⁹²

Not all barbs at opposing counsel are viewed with disfavor, however, at least when packaged in humor rather than vitriol. In *Beta Steel v. Rust*,¹⁹³ the appellant "t[ook] issue with a footnote in [the appellee's] brief that compares [the appellant's] characterization of some of the designated evidence to 'the Wizard of Oz whose presence is uncovered by Toto but continues to shout into the microphone: Pay no attention to the man behind the curtain!'"¹⁹⁴ The court of appeals denied the appellant's request to strike the footnote, stating, "This is a unique characterization of an opposing party's position, but not one that we can label 'scandalous,' 'impertinent,' or 'immaterial.' We do not automatically condemn an attempt to place some light humor into a brief, albeit at the expense of opposing counsel" ¹⁹⁵

6. *Appeals Warranting Sanctions.*—At least two opinions during this reporting period held that the arguments advanced on appeal were so groundless as to warrant appellate attorneys fees as a sanction.

In *Gaddis v. McCullough*,¹⁹⁶ an election contest case, the trial court found against the unsuccessful candidates' claims. The trial court denied the successful candidates' motion for attorneys fees, but did so noting "the winning candidates presented 'a strong basis' for their attorneys' fee claim."¹⁹⁷ Undaunted, the unsuccessful candidates, except for one, appealed. On appeal, the successful candidates asked the court to reverse the trial court's denial of trial attorney's fees and to award appellate attorney's fees as well. The court of appeals granted the successful candidates' request, stating:

The argument for appellate attorneys' fees is even stronger because the unsuccessful litigants persisted despite the trial court's warning of the futility of their cause. *The unsuccessful candidates should have heeded the trial court's alert that there was a "strong basis" for sanctions in the*

191. *Id.* at 198 (Baker, J., concurring).

192. *See Crosson*, 841 N.E.2d 186.

193. 830 N.E.2d 62 (Ind. Ct. App. 2005).

194. *Id.* at 69 (internal citation and quotation marks omitted).

195. *Id.*

196. 827 N.E.2d 66 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 181 (Ind. 2005).

197. *Id.* at 70.

trial court. Trial courts rarely provide such warnings. The trial court spelled out clearly for the unsuccessful candidates the problems with their claim.¹⁹⁸

Still refusing to take “no” for an answer, the unsuccessful candidates petitioned the supreme court for transfer, which the court denied on August 25, 2005.¹⁹⁹

In *Shepherd v. Truex*,²⁰⁰ the court of appeals noted that there are two forms of “bad faith” warranting appellate attorneys’ fees, “substantive”²⁰¹ and “procedural.”²⁰² The court found both to exist in this case and awarded the appellees attorney’s fees.²⁰³

It found substantive bad faith because, it held, “[t]he issues in this appeal [were] meritless, and the abundant underlying litigation amounts to harassment.”²⁰⁴ The court noted:

Shepherd has filed three lawsuits surrounding the gun incident that occurred in 1999, and, in the present case, he has named as defendants those people that were witnesses in the criminal case against Truex. We cannot glean from the documents on appeal how Shepherd has been injured or damaged based upon his almost indecipherable claims, and we are furthermore unable to determine any plausible explanation for the need to continue to file lawsuits with regard to this incident.²⁰⁵

It also found procedural bad faith:

based upon the inordinate time this Court was required to spend, first, deciphering Shepherd’s unintelligible appellate claims, and second, formulating coherent determinations to make sense of Shepherd’s assertions. Further, in presenting all of his six allegations of error, Shepherd completely failed to comply with Ind. Appellate Rule 46(A)(8)(a) which requires cogent reasoning as well as citations to authorities, statutes, and the appendix or the record on appeal.²⁰⁶

198. *Id.* at 78 (emphasis added).

199. *See Gaddis*, 841 N.E.2d 181.

200. 819 N.E.2d 457 (Ind. Ct. App. 2004).

201. *Id.* at 464. “To prevail on a substantive bad faith claim, the party must show that the appellant’s contentions and arguments are devoid of all plausibility.” *Id.*

202. *Id.*

[P]rocedural bad faith occurs when a party flagrantly disregards the form and content requirements of the appellate rules, omits and misstates relevant facts from the record, and files briefs written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court. Even if the appellant’s conduct is not necessarily deliberate, procedural bad faith can still be found.

Id. (internal citation omitted).

203. *Id.* at 465.

204. *Id.* at 464.

205. *Id.*

206. *Id.*

Unlike the appellants in *Gaddis*, Shepherd did not file a Petition To Transfer.

7. *Failure to Present Cogent Argument.*—Appellate Rule 46(A)(8)(a) requires the “argument” section of an appellate brief to “contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on”²⁰⁷ The survey period saw a large number of appellate issues deemed waived for failure to abide by this requirement.²⁰⁸ A few of those cases will be discussed here.

As alluded to above, in *Shepherd v. Truex* the court had much to say about why it found the appellant’s argument waived for lack of cogency:

“While we prefer to decide cases on their merits, we will deem alleged errors waived where an appellant’s noncompliance with the rules of appellate procedure is so substantial it impedes our appellate

207. IND. APP. R. 46(A)(8)(a).

208. See, e.g., *Edwards v. State*, 832 N.E.2d 1072, 1080 n.13 (Ind. Ct. App. 2005); *Gonzales v. State*, 831 N.E.2d 845, 846 n.1 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 184 (Ind. 2005); *Morfin v. Estate of Martinez*, 831 N.E.2d 791, 800 n.5 (Ind. Ct. App. 2005); *Liberty Mut. Ins. Co. v. OSI Indust., Inc.*, 831 N.E.2d 192, 198 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 190 (Ind. 2005); *Mullins v. Parkview Hosp., Inc.*, 830 N.E.2d 45, 60 n.9 (Ind. Ct. App. 2005), *reh’g denied* (Ind. Ct. App.), *reh’g denied* (Ind. Ct. App. 2006), *trans. pending*; *Nance v. Miami Sand & Gravel, LLC*, 825 N.E.2d 826, 837 n.5, 839 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 180 (Ind. 2005); *Haddix v. State*, 827 N.E.2d 1160, 1162 n.1 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 187 (Ind. 2005); *In re Involuntary Termination of the Parent-Child Relationship of A.I.*, 825 N.E.2d 798, 816 n.4 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 748 (Ind. 2005); *Galligan v. Ind. Dep’t of State Revenue*, 825 N.E.2d 467, 480 n.16 (Ind. Tax Ct.), *trans. denied*, 841 N.E.2d 180 (Ind. 2005); *Kendall v. State*, 825 N.E.2d 439, 448 n.6 (Ind. Ct. App. 2005), *trans. pending*; *Montgomery v. Bd. of Trs. of Purdue Univ.*, 824 N.E.2d 1278, 1279 n.3, 1282 n.8 (Ind. Ct. App.), *trans. granted*, 841 N.E.2d 181 (Ind. 2005); *Harris v. State*, 824 N.E.2d 432, 435 n.1 (Ind. Ct. App. 2005); *Watson v. Auto Advisors, Inc.*, 822 N.E.2d 1017, 1028, 1029 n.13 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 749 (Ind. 2005); *\$100 & a Black Cadillac v. State*, 822 N.E.2d 1001, 1006 n.6 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 748 (Ind. 2005); *Smith v. State*, 822 N.E.2d 193, 205 n.9 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 741 (Ind. 2005); *Polk v. State*, 822 N.E.2d 239, 245 n.5 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 743 (Ind. 2005); *One Dupont Ctr., LLC v. Dupont Auburn, LLC*, 819 N.E.2d 507, 516 n.5 (Ind. Ct. App. 2004); *Woolum v. State*, 818 N.E.2d 517, 521 n.1 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 735 (Ind. 2005); *LTL Truck Serv., LLC v. Safeguard, Inc.*, 817 N.E.2d 664, 671 n.4 (Ind. Ct. App. 2004); *Maggert v. Call*, 817 N.E.2d 649, 650 n.1 (Ind. Ct. App. 2004). But see *Ott v. AlliedSignal, Inc.*, 827 N.E.2d 1144, 1149 n.3 (Ind. Ct. App.) (“We choose to address Ott’s argument on the merits despite the fact that it is unsupported by any citation to authority in her brief. See Ind. Appellate Rule 46(A)(8)(a).”), *trans. denied*, 841 N.E.2d 187 (Ind. 2005); *AutoXchange.com, Inc. v. Dreyer & Reinbold, Inc.*, 816 N.E.2d 40, 44–45 (Ind. Ct. App. 2004) (addressing merits of appellants’ claims, despite finding appellants’ briefs “fail[ed] to address [the] court with cogent reasoning, [and] none of their contentions [were] supported by citations to authorities or relevant parts to [sic] the record and therefore [their briefs] amount[ed] to nothing more than mere rambling allegations”).

consideration of the errors.” *The purpose of the appellate rules, especially Ind. Appellate Rule 46, is to aid and expedite review, as well as to relieve the appellate court of the burden of searching the record and briefing the case. . . .* It is well settled that we will not consider an appellant’s assertion on appeal when he has failed to present cogent argument supported by authority and references to the record as required by the rules. If we were to address such arguments, we would be forced to abdicate our role as an impartial tribunal and would instead become an advocate for one of the parties. This, clearly, we cannot do.

In the present case, Shepherd’s argument on this last issue is utterly devoid of cogent argument. *He does cite to some authority, but he merely gives the cite, perhaps asserting what the cited authority allegedly states, and then wholly fails to explain in what way, if at all, the referenced authority affects or relates to the present case. Put simply, Shepherd’s argument is too poorly developed and improperly expressed to be considered cogent argument as required by the rules of appellate procedure.*

Moreover, Shepherd cannot take refuge in the sanctuary of his amateur status. As we have noted many times before, a litigant who chooses to proceed *pro se* will be held to the same rules of procedure as trained legal counsel and must be prepared to accept the consequences of his action. Thus, this issue is waived for lack of cogent argument.²⁰⁹

Lack-of-cogency findings during the survey period were not limited to pro se litigants. In *Whinery v. Roberson*,²¹⁰ the appellants, who were represented by one of the larger Indianapolis law firms, made the following argument in their appellant’s brief concerning an Indiana Constitution claim:

Alternatively, the Class is entitled to prospective injunctive relief under . . . the Indiana Constitution for the deprivation of property without due process. *See State v. Hayes*, 177 Ind. App. 196, 378 N.E.2d 924, 931 (Ind. Ct. App. 1978) (Art. I, § 21 of the Indiana Constitution provides cause of action for deprivation of property).²¹¹

The court of appeals found this argument waived for lack of cogency, noting that it “fail[ed] to articulate what constitutes a property deprivation, among other prerequisites, pursuant to the Indiana Constitution and [left] the task of developing their argument to this court.”²¹²

209. *Shepherd v. Truex*, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004) (emphasis added) (internal citations omitted).

210. 819 N.E.2d 465 (Ind. Ct. App. 2004), *trans. dismissed* (Ind. 2006).

211. *Id.* at 479.

212. *Id.* at 479-80.

The appellant in *Goodwine v. Goodwine*,²¹³ who was an attorney proceeding pro se, fared little better. The court specifically cautioned him “to pay closer attention to the Rules of Appellate Procedure in the future,” calling his brief “confusing, disorganized, and [failing to] comply with the Rules of Appellate Procedure.”²¹⁴

These latter instances mainly concern arguments raised by an appellant. When the appellee fails to make a minimally adequate argument, the result is not necessarily victory for the appellant on the issue, as it usually is for the appellee when an appellant who fails to present a cogent argument, finds its issue deemed waived. Rather, the court on appeal treats the issue as if no appellee’s brief was filed addressing the issue and reviews the appellant’s claim for prima facie error. The difference in “lack of cogent argument” treatment between the appellant and the appellee mirrors Appellate Rule 45(D), which states, “The appellant’s failure to file timely the appellant’s brief may subject the appeal to summary dismissal. The appellee’s failure to file timely the appellee’s brief may result in reversal of the trial court or Administrative Agency only on a showing of prima facie error.”²¹⁵ The survey period saw at least two published opinions in which an appellee’s failure to present cogent argument resulted in review for prima facie error.²¹⁶

Finally, one other case deserves mentioning under the guise of “lack of cogent argument,” not because the argument was unsupported by citations or was too confusing to follow, but because it just plain lacked any semblance of logic. In *E.L.C. Electric, Inc. v. Indiana Department of Labor*,²¹⁷ the Indiana Department of Labor (“IDOL”) had found E.L.C. Electric, Inc. (“E.L.C.”), a government contractor, to be in violation of the Common Construction Wage Act,²¹⁸ and issued letters to E.L.C.’s employees and others to that effect.²¹⁹ In the defamation lawsuit filed by E.L.C. that followed, the IDOL won summary judgment.²²⁰ During the appeal, E.L.C. contended that the IDOL’s “failure to submit ELC’s records as to ELC’s payment of wages and fringe benefits denied the trial court the ability ‘to determine . . . whether there is or is not a factual dispute.’”²²¹ The court of appeals, calling the argument “perverse,” stated, “[i]t is difficult to conceive of a circumstance where the failure to present the other party’s evidence could be argued by the other party as a basis for staving off

213. 819 N.E.2d 824 (Ind. Ct. App. 2004).

214. *Id.* at 826 n.1.

215. IND. APP. R. 45(D).

216. *Gamble v. State*, 831 N.E.2d 178, 184 n.4 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 184 (Ind.), *reh’g denied* (Ind. Ct. App. 2005); *Simon Prop. Group, L.P. v. Brandt Const., Inc.*, 830 N.E.2d 981, 995 (Ind. Ct. App. 2005), *trans. denied* (Ind. 2006).

217. 825 N.E.2d 16 (Ind. Ct. App. 2005).

218. *Id.* at 17 & n.1 (citing IND. CODE §§ 5-16-7-1 to -5 (2005)).

219. *Id.* at 18.

220. *Id.* at 19.

221. *Id.* at 19 n.8.

summary judgment.”²²²

8. *More Practice Pointers.*—

a. *Don't be cavalier concerning supreme court orders and practice.*—*DFS Secured Health Care Receivables Trust v. Caregivers Great Lakes, Inc.*²²³ involved a certified question from the Seventh Circuit Court of Appeals to the Indiana Supreme Court. The court accepted the certified question,²²⁴ ordered briefing,²²⁵ and set the matter for oral argument on December 20, 2004.²²⁶

The briefs were due on Monday, November 22, 2004.²²⁷ However, on Friday, November 19, 2004, the appellants' counsel sent the Clerk of the Supreme Court a letter stating, “The parties have agreed to settle the above-referenced case. Accordingly, neither party will be filing briefs on November 22, 2004, as is currently required by the Court's scheduling order.”²²⁸ Following receipt of this letter, the Supreme Court's Administrator contacted the appellants' counsel and informed him that the Court needed something more formal from the parties concerning their desire not to continue with the case, such as a joint motion to dismiss.²²⁹ The appellants' counsel responded that the appellee's counsel was unavailable and therefore the parties would not be able to submit such a motion until December 6, 2004, at the earliest.²³⁰ With the oral argument less than two weeks away and no briefs on file, on December 7, 2004, the court's Administrator contacted the appellants' counsel to inquire about the status of the motion he said would be forthcoming. The appellants' counsel responded that he had been expecting the Administrator's call, the parties' settlement had “hit a snag,” and he did not know when the parties would be filing a motion with the court requesting dismissal but hoped it would be soon.²³¹

The supreme court had this to say about this sequence of events:

The cavalier approach with which the parties have handled this matter is extremely troubling.

First, this Court's order of October 13th specifically states, “The two

222. *Id.*

223. *DFS Secured Health Care Receivables Trust v. Caregivers Great Lakes, Inc.*, No. 94S00-0410-CQ-447 (Ind. 2004). Although this case did not involve a published order or opinion, what transpired, all of which is reflected in orders of the Indiana Supreme Court, is highly relevant to Indiana appellate practitioners and worthy of consideration by them.

224. *Caregivers Great Lakes*, No. 94S00-0410-CQ-447 (Ind. Oct. 13, 2004) (order accepting certified question).

225. *Id.* Briefs were initially due on November 15, but the deadline was extended by one week, making the new filing deadline November 22.

226. *Caregivers Great Lakes*, No. 94S00-0410-CQ-447 (Ind. Nov. 17, 2004) (order).

227. *Caregivers Great Lakes*, No. 94S00-0410-CQ-447 (Ind. Nov. 12, 2004) (order).

228. *Caregivers Great Lakes*, No. 94S00-0410-CQ-447 (Ind. Dec. 13, 2004) (order).

229. *Id.*

230. *Id.*

231. *Id.*

main briefs and the appendix must be filed by November 15, 2004.” Upon the parties’ joint motion, this deadline was extended by one week, but the requirement that briefs in fact be filed remained. Appellant’s counsel affirmed his awareness of the mandatory nature of this Court’s orders when he acknowledged in his letter that the Court’s orders “required” the filing of the parties’ main briefs by November 22, 2004. Rather than *requesting* that those orders be stayed or revised, the parties presumptuously *informed* the Court of their intent to disregard its orders and placed the burden on this Court to tell the parties if anything more was required.

Second, Appellants’ counsel’s letter informed the Court that the parties had “agreed to settle” the case and they desired the Court to “close its file.” When contacted initially by the Administrator, Appellants’ counsel did not indicate the parties’ settlement was tentative or uncertain. When contacted on December 7, 2004, however, Appellant’s counsel indicated he had been expecting the Administrator’s call and, in effect, that the settlement negotiations were stalled and he could not state when a joint motion to dismiss the matter might be tendered. The parties should not have informed the Court that the case had settled and that the Court’s file should be closed if they were not in a position to file a motion to dismiss. Further, the moment the parties “hit a snag,” it was incumbent upon them to notify the Court immediately that their representations in the November 19 letter were incorrect, rather than waiting for the Court’s Administrator to contact them to inquire about the status of the joint motion that they, through Appellants’ counsel, had previously suggested would be forthcoming.²³²

Because the parties had failed to file any briefs, the court found it “impossible for the oral argument scheduled for December 20, 2004, to be of any value in this Court’s determination of the questions certified to it by the Seventh Circuit.”²³³ Accordingly, the court vacated the oral argument set for that date. In its stead, however, the court ordered the parties’ counsel to appear at the time the oral argument would have occurred “to show cause why they should not be held in contempt for failure to comply with this Court’s scheduling orders.”²³⁴

A show cause hearing was indeed held on that date, at which at least one of the parties’ counsel was represented by his own attorney. Thereafter, the court determined not to hold the attorneys in contempt. In its order so stating, however, it advised the parties’ attorneys, and the local attorney who had represented one of them at the hearing

that the proper practice before this Court is to ask this Court, through a written motion filed in compliance with the Indiana Rules of Appellate

232. *Id.*

233. *Id.*

234. *Id.*

Procedure, for extension or continuance of court-imposed deadlines, rather than simply to tell this Court, through written or oral communication to this Court's Administrator, that the parties will not be complying with court-imposed deadlines.²³⁵

b. Don't repack and refile losing motions.—In *Sanders v. State*,²³⁶ Sanders was convicted of dealing in cocaine, maintaining a common nuisance, and possession of marijuana.²³⁷ When arrested, he had \$2496 in his possession, which the State seized pursuant to Indiana Code section 34-24-1-1.²³⁸ Following his conviction, the State filed a “motion for release/application” under Indiana Code section 34-24-1-3²³⁹ seeking to have the \$2496 awarded to the State to reimburse it for the “law enforcement costs” that resulted in Sanders’ arrest.²⁴⁰ The trial court granted the motion, but the court of appeals reversed because the State’s motion had been untimely filed.²⁴¹ The trial court then vacated its order. However, a few weeks later the State filed a “petition for reimbursement of investigative costs,” seeking reimbursement for the costs for the investigation that led to Sanders’ arrest.²⁴² The trial court granted the motion, and Sanders again appealed. The court of appeals reversed, noting:

Although the State’s second request was characterized as one for “investigative costs,” it clearly was an action for reimbursement of law enforcement costs pursuant to Indiana Code Section 34-24-1-3. Moreover, it is substantively the same as the State’s earlier motion. We have already concluded the trial court improperly granted the motion . . .

Despite our earlier ruling, the State refiled the same motion. The State provides no explanation for its actions and we cannot attempt to ascertain why it thought such a request would be permissible a second time around, especially given that almost an entire year had passed since it filed the first untimely motion. What was improper on direct appeal is still improper and the recaptioning of a petition cannot and does not change the relief requested in the petition.²⁴³

c. Give good reasons for requesting oral argument.—Appellate Rule 52

235. *Caregivers Great Lakes*, No. 94S00-0410-CQ-447 (Ind. Feb. 24, 2005) (order).

236. 823 N.E.2d 1214 (Ind. Ct. App. 2005).

237. *Id.* at 1215.

238. *Id.*

239. *Id.* Indiana Code section 34-24-1-3 permits the State to seek “reimbursement of law enforcement costs” out of property lawfully seized under Indiana Code sections 34-24-1-1 and 2. IND. CODE § 34-24-1-3 (2005).

240. *See Sanders*, 823 N.E.2d at 1215.

241. *See id.*

242. *Id.*

243. *Id.* at 1215-16.

gives parties the opportunity to request oral argument on a pending matter via a timely filed motion.²⁴⁴ When submitting such a motion, however, be sure to include all of the items listed in Indiana Appellate Rule 34(E) concerning the content of motions, rather than simply informing the court that oral argument is desired. In *Glasscock v. Corliss*,²⁴⁵ the court of appeals, citing Indiana Appellate Rule 34(E)(1),²⁴⁶ denied a motion for oral argument because the motion “stated no reasons supporting the motion.”²⁴⁷

d. Make sure pro hac vice counsel understands and complies with the appellate rules.—The appellant in *HemoCleanse, Inc. v. Philadelphia Indemnity Insurance Co.*²⁴⁸ was primarily represented by California counsel admitted *pro hac vice*.²⁴⁹ California counsel apparently did not have a good grasp of Indiana’s appellate rules, as the court of appeals noted, “We understand that California likely has different rules for the format of appellate briefs, but we caution counsel that it is always prudent to familiarize oneself with the appellate rules of the jurisdiction in which a brief is being submitted.”²⁵⁰ Of course, the appellant was also represented by local counsel.²⁵¹ If the appellant’s brief was deficient enough to warrant comment by the court, one wonders why local counsel (who presumably is more familiar with Indiana’s rules of procedure) did not review the brief before submission and inform lead counsel of its deficiencies?

e. List all of your issues on appeal in your brief’s Statement of Issues.—Appellate Rule 46(A), which addresses the required contents of an Appellant’s Brief, states the following when discussing the brief’s Argument section: “The argument must contain the contentions of the appellant *on the issues presented*, supported by cogent reasoning.”²⁵² The court of appeals interpreted this to mean that an appellant may not raise an issue in the brief’s Argument section unless the issue was listed in the Statement of Issues²⁵³ portion of the brief.²⁵⁴

244. See IND. APP. R. 52(A), (B).

245. 823 N.E.2d 748 (Ind. Ct. App.), *reh’g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 183 (Ind. 2005).

246. “[A] motion . . . shall contain . . . [a] statement particularizing the grounds on which the motion . . . is based . . .” IND. APP. R. 34(E)(1).

247. *Glasscock*, 823 N.E.2d at 751 n.1.

248. 831 N.E.2d 259 (Ind. Ct. App. 2005), *reh’g denied* (Ind. Ct. App.), *trans. denied* (Ind. 2006).

249. *Id.* at 262 n.1.

250. *Id.*

251. See IND. ADMIS. DISC. R. 3 § 2(A)(1) (requiring member of Indiana bar to appear and act as co-counsel in case in which a foreign attorney is admitted *pro hac vice*).

252. IND. APP. R. 46(A)(8)(a) (emphasis added).

253. See *id.* 46(A)(4).

254. See *Gonzales v. State*, 831 N.E.2d 845, 846 n.1 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 184 (Ind. 2005). But see *Buck v. Grube*, 833 N.E.2d 110, 117 n.4 (Ind. Ct. App. 2005) (finding appellant failed to list an argument in her statement of the issues but holding the noncompliance “not so substantial as to impede [the court’s] consideration of her arguments” and therefore addressing the argument on its merits).

f. When drafting a Statement of Facts, cite evidence, not the trial court's judgment or prior filings by the parties.—In *Kalwitz v. Estate of Kalwitz*,²⁵⁵ the parties' Statements of Facts cited to the trial court's judgment, rather than to the transcript or any documentary evidence in the Record on Appeal.²⁵⁶ The court of appeals made special note that such a practice, while technically compliant with Appellate Rule 46(A)(6)(a), is not appropriate "in a case where the factual findings of a judgment are challenged."²⁵⁷ Rather, the court noted, "citations to the transcript would be far more helpful for [its] review."²⁵⁸ Similarly, in *Beta Steel v. Rust*,²⁵⁹ the court of appeals noted that "[i]t would have better facilitated [the court's] review if [the appellee] had cited [the court] directly to the designated evidence in her appellate brief, rather than to her trial court memoranda."²⁶⁰

g. Appellees, be careful when using Appellate Rule 46(B)(1).—Appellate Rule 46(B)(1) permits an appellee's brief to omit, among other things, "the statement of facts if the appellee agrees with the statements [of fact] in the appellant's brief."²⁶¹ Appellees should not use this option, however, if they intend to argue facts not articulated in an appellant's statement of facts, as noted by the court of appeals in *Williamson v. Williamson*:²⁶²

We remind Mother that Ind. Appellate Rule 46(B)(1) permits an appellee's brief to omit the statement of facts if the appellee agrees with the statements in the appellant's brief. Here, Mother omitted the statement of facts and agreed with Father's statement of facts. However, in her argument regarding the modification of custody, Mother then presented numerous facts related to the modification that were not present in Father's statement of the facts. These facts would have been more appropriately presented for the first time in Mother's statement of facts rather than in the argument.²⁶³

h. Arguments in briefs should stand alone.—It is not uncommon for attorneys to attempt to satisfy briefing page limits, or simply save time, by attempting to "incorporate by reference" arguments made in previous filings rather than setting out the argument in their briefs. This practice is frowned upon by some appellate jurists, as noted in *Oxley v. Lenn*:²⁶⁴

To support his claim that his failure to tender the summons with the

255. 822 N.E.2d 274 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 748 (Ind. 2005).

256. *See id.* at 276 n.2.

257. *Id.*

258. *Id.*

259. 830 N.E.2d 62 (Ind. Ct. App. 2005).

260. *Id.* at 68.

261. IND. APP. R. 46(B)(1).

262. 825 N.E.2d 33 (Ind. Ct. App. 2005).

263. *Id.* at 35 n.1.

264. 819 N.E.2d 851 (Ind. Ct. App. 2004).

complaint did not constitute legal malpractice, Lenn “direct[s] this Court’s attention” to the argument section of his summary judgment brief submitted to the trial court and asks us to incorporate by reference said argument. We refuse to do so. Ind. Appellate Rule 46(B)(2) provides that argument contained in an appellee’s brief “shall address the contentions raised in the appellant’s argument.” Lenn may not evade this requirement by referring us to arguments found in a brief filed at some earlier point in the case. See *Pluard ex rel. Pluard v. Patients Compensation Fund*, 705 N.E.2d 1035, 1038-39 (Ind. Ct. App. 1999) (holding that an attempt to incorporate an entire argument raised and argued in the trial court by reference in a footnote does not comply with either the letter or the spirit of former Appellate Rules), *trans. denied*; *Greg Allen Const. Co., Inc. v. Estelle*, 762 N.E.2d 760, 778-779 (Ind. Ct. App. 2002) (finding that an appellant had waived an issue for appellate review where it had presented no argument for this court’s review where the appellant had merely asked to incorporate by reference the appellant’s argument made to the trial court), *aff’d in relevant part, vacated in part on other grounds by* 798 N.E.2d 171 (Ind. 2003).

i. Stating the Standard of Review.—The appropriate standard of review must be stated in an appellate brief.²⁶⁵ That being said, practitioners should keep in mind that in most cases, Indiana appellate court jurists are very familiar with the applicable standard of review and do not need an extensive recitation on it. In *Troxel Equipment Co. v. Limberlost Bancshares*,²⁶⁶ the court of appeals specifically made this point to appellant’s counsel, noting:

“[T]he argument must include for each issue a *concise* statement of the applicable standard of review” App. R. 46(A)(b)(6) (emphasis added). The total of seven pages that Troxel spent discussing the law of summary judgment is far from concise. We advise counsel to carefully consider to what use they put their allotted space in future appellate briefs.²⁶⁷

At the other end of the spectrum, the court admonished counsel in *Tobin v. Ruman*²⁶⁸ for failing to include the standard of review. The attorney’s brief stated that “the standards for deciding motions for summary judgment constitute such a familiar litany that they need no restatement here.”²⁶⁹ The court responded by

direct[ing the attorney] to Indiana Appellate Rule 46(A)(8)(b), which requires the appellant to include a description of the applicable standard

265. See IND. APP. R. 46(A)(8)(b).

266. 833 N.E.2d 36 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 189 (Ind. 2005).

267. *Id.* at 37 n.1.

268. 819 N.E.2d 78 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 747 (Ind. 2005).

269. *Id.* at 83 n.3.

of review. Although Tobin is pro se, he is also an attorney who is licensed in Indiana and Illinois. We caution him to pay closer heed to the rules in the future.²⁷⁰

j. What do you do if your client dies?—In *Gard v. Gard*,²⁷¹ a dissolution case, the wife died during the pendency of the appeal. The court of appeals learned of her death by way of husband, who filed a report with the court notifying it of that fact four weeks after her death. At the time the court of appeals' opinion was handed down, however, no one had moved to substitute a successor party under Appellate Rule 17(B). The court noted, "In similar cases, we believe that the better practice would be for the deceased or incompetent party's counsel to file a motion for substitution as promptly as possible to avoid any complications that might arise."²⁷²

k. Amending briefs.—When seeking to amend a brief, litigants have *only* two options: (1) tender an entirely new brief and copies along with a motion; or (2) request permission to retrieve the original and copies and substitute the amended pages.²⁷³ During the survey period, the court of appeals noted that litigants *cannot* submit an "amended" brief that only contains the "amended" material and then attempt to incorporate the remainder from the original brief.²⁷⁴ Neither can they rely on the information conveyed in their motion for leave to amend as effectively "amending" their briefs.²⁷⁵

l. Judicial Notice.—In *In re Contempt of Wabash Valley Hosp., Inc.*,²⁷⁶ the appellee submitted an appendix containing public records that were not part of the record on appeal.²⁷⁷ The court of appeals found this improper, noting that, although a court can take judicial notice of public records, "the public record should be drawn to the court's attention by motion or, if publicly available, cited as authority. The appellate rules do not permit material to be included in a party's appendix that was not presented to the trial court."²⁷⁸

A different result occurred in *Beta Steel v. Rust*.²⁷⁹ There, the appellee objected to a footnote in the appellant's brief containing "references to statistics regarding accidental deaths in the United States, including those attributable to electricity" because they were not designated to the trial court during the summary judgment proceedings.²⁸⁰ The footnote, the court noted, "was added in

270. *Id.*

271. 825 N.E.2d 907 (Ind. Ct. App. 2005).

272. *Id.* at 908 n.1.

273. *See* IND. APP. R. 47.

274. *Everage v. N. Ind. Pub. Servs. Co.*, 825 N.E.2d 941, 943 n.1 (Ind. Ct. App. 2005).

275. *Safety Nat'l Cas. Co. v. Cinergy Corp.*, 829 N.E.2d 986, 1006 n.11 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 187 (Ind. 2005).

276. 827 N.E.2d 50 (Ind. Ct. App. 2005).

277. *See id.* at 57 n.6.

278. *Id.* (citing IND. APP. R. 27 & 50(A)(1)).

279. 830 N.E.2d 62 (Ind. Ct. App. 2005).

280. *Id.* at 69.

response to [the appellee's] assertion . . . [in] its brief, alleging that '[t]his Court can take judicial notice that welding occurs literally thousands of times per day in the workplace without injury.'"²⁸¹ Thus, because the appellant's statistics were "simply a demonstration of why it would be improper to take judicial notice of [the appellant's] alleged fact regarding the safety of welding," the court declined to strike them.²⁸²

m. Notice of additional authorities may be used only to supplement arguments already made.—In *Williams v. State*,²⁸³ the court of appeals took the appellant to task for attempting to use a Notice of Additional Authorities to introduce an argument that the appellant had not raised in the Appellant's Brief, calling the tactic "improper" and finding the argument waived.²⁸⁴

n. An objection at a deposition is not enough to preserve issue for appeal.—In *Beta Steel v. Rust*,²⁸⁵ the appellant asked the court of appeals to strike portions of the appellee's brief that relied upon the deposition of an electrical engineer who, the appellant contended, was not qualified to give the opinions he gave.²⁸⁶ Although the appellant purported to have objected to this testimony during the deposition, he cited nothing to the court of appeals showing he had asked the trial court to rule on his objection or to strike this testimony from the appellee's designated summary judgment evidence. Therefore, the court of appeals found the appellant's argument waived.²⁸⁷

o. Note related cases in the appellant's case summary.—In *Moore v. State*,²⁸⁸ the criminal defendant/appellant had been tried jointly with a co-defendant who had appealed separately.²⁸⁹ The same counsel represented both appellants in their separate appeals. When filling out the appellant's case summary in appellant Moore's case, however, counsel failed to mention the other case. The court of appeals "direct[ed] counsel's attention to Indiana Appellate Rule 15(C)(4)(c), which provides that an appellant's case summary shall include information regarding '[r]elated appeals (prior, pending or potential) known to the party[.]'"²⁹⁰

p. In extraordinary circumstances, Trial Rule 60(B) can resurrect an otherwise untimely appeal.—In *Town of Merrillville v. Shelhart*,²⁹¹ there were multiple claims raised in the plaintiff's complaint, but the parties' cross-motions

281. *Id.*

282. *Id.*

283. 829 N.E.2d 198 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 187 (Ind. 2005).

284. *Id.* at 201 n.3.

285. 830 N.E.2d 62.

286. *Id.* at 68.

287. *Id.* at 69.

288. 827 N.E.2d 631 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 186 (Ind. 2005).

289. *Id.* at 636.

290. *Id.* at 636 n.3 (second and third brackets in original).

291. 834 N.E.2d 208 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 191 (Ind. 2005).

for summary judgment addressed only one. The trial court issued an order granting the defendant's motion and denying the plaintiff's.²⁹² Because the plaintiff viewed the order as interlocutory, given the other claims raised in its complaint, it moved to certify the order for interlocutory appeal under Appellate Rule 14(B)(1). The trial court, however, denied the motion, stating that its previous order had disposed of all claims between the parties. Further, it issued its order denying the motion to certify after the plaintiff's deadline for filing a notice of appeal,²⁹³ thereby leaving the appellant no other opportunity to appeal.²⁹⁴

The appellant filed a Trial Rule 60(B) motion in the trial court seeking to have its judgment "opened up" and a new order issued that clearly disposed of all claims,²⁹⁵ which essentially would have given the appellant a second chance to file a timely notice of appeal. Although the trial court denied the motion, the court of appeals reversed, stating:

The town acted promptly in first seeking to appeal the trial court's order of November 5, 2004, and then to seek relief from an order that effectively foreclosed its appeal of that order. Equity aids the vigilant. Based upon the circumstances presented and upon equitable principles, we find that the trial court abused its discretion when it did not grant the Town's motion for relief and allow the action to continue *in fieri* to a final judgment on all claims.²⁹⁶

However, practitioners should remember that if they miss an appeal deadline because the trial court did not send them notice of its final judgment, then Trial Rule 72(E), not Trial Rule 60(B), is the appropriate vehicle to get clients' appeal rights reinstated.²⁹⁷

III. MISCELLANEOUS DEVELOPMENTS

A. *Data from the Indiana Supreme Court*²⁹⁸

The Indiana Supreme Court saw a thirteen percent decline in fiscal year 2005 in criminal transfer petitions transmitted from the Clerk's Office (511 in fiscal

292. *Id.* at 212.

293. *Id.*

294. *Id.* at 214; *see* IND. APP. R. 9(A)(5).

295. *Town of Merrillville*, 834 N.E.2d at 212-13.

296. *Id.* at 214-15 (internal citation omitted).

297. *See In re Sale of Real Property with Delinquent Taxes or Special Assessments*, 822 N.E.2d 1063, 1067-69 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 179 (Ind. 2005).

298. The information contained in this subsection can be found in INDIANA SUPREME COURT ANNUAL REPORT JULY 1, 2004 – JUNE 30, 2005, at 30-32, and INDIANA SUPREME COURT ANNUAL REPORT JULY 1, 2003 – JUNE 30, 2004, at 30-32. The 2004-2005 Report is available at <http://www.in.gov/judiciary/supremeadmin/docs/0405report.pdf>. The 2003-2004 Report is available at <http://www.in.gov/judiciary/supremeadmin/docs/0304report.pdf>.

year 2005 versus 590 in fiscal year 2004) and a twelve percent rise in civil transfer petitions transmitted from the Clerk's Office (335 in fiscal year 2005 versus 299 in fiscal year 2004). The court's total dispositions followed a similar trend. In fiscal year 2005, the court disposed of 1063 cases that required a vote from each justice, fifty-one percent of which were criminal cases (a four percent decrease from fiscal year 2004) and thirty-two percent were civil, tax, or other cases not involving attorney discipline, judicial discipline, certified questions, original actions, or rehearings (a two percent increase from fiscal year 2004). The opposite of this trend, however, was reflected in the cases the justices selected for the issuance of majority opinions or dispositive orders. The court resolved 170 of the 1063 dispositions by majority opinion or published dispositive order, an increase of sixteen over the previous fiscal year's 154. Of these 170 opinions and published dispositive orders, thirty-five percent were criminal cases (a one percent increase from fiscal year 2004), and twenty-five percent of which were civil, tax, or other cases not involving attorney discipline, judicial discipline, certified questions, original actions, or rehearings (a ten percent decrease over fiscal year 2004). Thus, these statistics suggest the court took a greater interest in criminal matters over civil matters in fiscal year 2005, which is different than what has occurred in recent years.

Another interesting statistic is found in the number of non-dispositive opinions written by the Justices during fiscal year 2005 as compared to the previous fiscal year. In fiscal year 2004, the Justices issued thirty-eight non-dispositive opinions, sixteen of which were dissents. In fiscal year 2005, the Justices issued twenty-six non-dispositive opinions (a thirty-two percent decline over the previous year), eight of which were dissents (a fifty percent decline over the previous year).

Finally, the Indiana Supreme Court conducted sixty oral arguments during its fiscal year ending June 30, 2005 (down from seventy-six in fiscal year 2004).

*B. Data from the Indiana Court of Appeals*²⁹⁹

During calendar year 2005, the Indiana Court of Appeals continued its blistering pace to keep up with the ever-increasing number of cases filed with it. It disposed of 2373 cases, an increase of seventy-one dispositions over 2004, and heard eighty-four oral arguments, an increase of seventeen over 2004. Once fully briefed, the average age of a case in chambers of a judge was 1.7 months, a slight decrease from 2004. The court reversed the judgment of the trial court in about thirty-nine percent of the civil appeals and in about sixteen percent of the criminal (non post-conviction relief) appeals, and about twenty-seven percent of its opinions were published. During this time period, the Chief Judge handed down 7610 orders (an increase of 317 over 2004), of which 3163 pertained to

299. The information contained in this subsection can be found in INDIANA COURT OF APPEALS, 2004 ANNUAL REPORT 1, 4, 12 (2005), and INDIANA COURT OF APPEALS, 2005 ANNUAL REPORT 1, 4, 12 (2006). The 2004 Report is available at <http://www.in.gov/judiciary/appeals/docs/2004report.pdf>. The 2005 Report is not available online as of publication of this Article.

various extensions of time (only twenty-six of which were denied), and 297 pertained to permissive interlocutory appeals (204 of which were denied).

C. *The McHenry Experiment—Update*

Last year's survey article discussed the Indiana Supreme Court's opinion in *McHenry v. State*,³⁰⁰ in which the opinion's author, Justice Brent Dickson, "experiment[ed]" with a new style of opinion writing, namely the placement of "all citations unessential to the text . . . in footnotes, and substantive matter that otherwise might appear in footnotes . . . in the text."³⁰¹ Because such a "format does not meet with universal approval,"³⁰² the *McHenry* opinion invited "[t]he public, the bench, and the bar" to provide comments on the format to the Indiana Supreme Court Administrator.³⁰³ Last year's survey article noted that thoughtful and well-reasoned responses had been arriving, invited more of the same, and foreshadowed a report on the results of the "*McHenry* experiment" in this year's Appellate Procedure survey article.

The results are in.³⁰⁴ An overwhelming majority (seventy-one percent) opposed the placement of citations in footnotes. The responses typically listed one or more of the following reasons for their opposition: (1) citations in footnotes make reading the opinion's text more difficult, physically and conceptually, because they disrupt an attorney's reading from the text to the bottom of the page, and back up again, which is even more difficult when reading an opinion electronically rather than on paper; (2) citations in footnotes do not provide the full context for the cited authority and make it difficult to track which cases are being relied upon for a given legal proposition; (3) respondents are simply accustomed to the current format and do not desire a change; and (4) attorneys have more difficulty cutting and pasting quotes from electronic opinions and briefs when the citations are in footnotes, because "id." citations in the opinion must be readjusted in the document into which the quote is being pasted. Because of the responses, the Indiana Supreme Court decided to maintain the status quo, at least for now, and continue placing citations in text rather than in footnotes.

300. 820 N.E.2d 124 (Ind. 2005).

301. *Id.* at 126 n.2; *see also* *Merritt v. State*, 829 N.E.2d 472, 473 n.3 (Ind. 2005); *Dial X-Automated Equip. v. Caskey*, 826 N.E.2d 642, 643 n.1 (Ind. 2005).

302. *McHenry*, 820 N.E.2d at 126 n.2 (citing Richard A. Posner, *Against Footnotes*, 38 CT. REV. 24 (Summer 2001)).

303. *Id.*

304. The results are on file with the author.

RECENT DEVELOPMENTS IN INDIANA CIVIL PROCEDURE

MICHAEL A. DORELLI*

During the survey period,¹ both the Indiana Supreme Court and the Indiana Court of Appeals continued to address a broad range of procedural issues of significance to Indiana practitioners. Further, the Indiana Supreme Court ordered several amendments to the Indiana Rules of Trial Procedure, with immediate practical impact.

I. AMENDMENTS TO INDIANA RULES OF TRIAL PROCEDURE

A. *Summary Judgment Hearing*

A hearing is no longer mandatory upon the filing of a motion for summary judgment, due to a recent amendment to Rule 56 of the Indiana Rules of Trial Procedure (“Rules” or “Indiana Trial Rules”). Effective January 1, 2006, a hearing on a summary judgment motion is mandatory only if “any party” files a motion requesting the hearing *within ten days* after the summary judgment response “was filed or was due.”² The new rule leaves open the question of when the request for hearing must be filed if the response is filed *before* it is due. Until clarification is attained, practitioners would be well advised to file the request for hearing within ten days of filing if the summary judgment response is filed early.

B. *Documents or Information Excluded from Public Access*

Effective January 1, 2005, Rule 5(G) was amended to require that documents excluded from public access pursuant to Indiana Administrative Rule 9(G)(1) must be filed on light green paper, and marked “Not for Public Access.”³ Rule 5(G) was amended further during the current survey period, effective January 1, 2006, to provide that whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper

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1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period—i.e., from October 1, 2004, through September 30, 2005—as well as amendments to the Indiana Rules of Trial Procedure, which were ordered by the Indiana Supreme Court during the survey period and became effective January 1, 2006.

2. IND. TRIAL R. 56(C). The above quoted text of Rule 56(C) appears as “was filed or due” in the 2006 Indiana Rules of Court publication. INDIANA RULES OF COURT—STATE 50 (Thomson West 2006).

3. IND. TRIAL R. 5(G)(1); *see also* Michael A. Dorelli, *Recent Developments in Indiana Civil Procedure*, 38 IND. L. REV. 919, 960-61 (2005) (discussing requirements of Rule 5(G) and enumerating categories of information excluded from public access pursuant to IND. ADMIN. R. 9(G)(1)).

“or have a light green coversheet attached to the document.”⁴ Further, documents or portions of documents excluded from public access must be marked either “Not for Public Access” or “Confidential.”⁵ Finally, the amended Rule no longer applies only to documents “prepared by a lawyer or party for filing.” Rather, the Rule now applies to every document “filed” in a case.⁶

C. Temporary Appearance

Rule 3.1 was amended, effective January 1, 2006, to provide for the filing of a “temporary appearance” in the event an attorney “is temporarily representing a party in a proceeding before the court, through filing a pleading with the court or in any other capacity including discovery.”⁷ Pursuant to the amended Rule, the court is not required to act on the temporary appearance, “unless the new temporary attorney has not appeared at the request of a party’s previously identified counsel.”⁸

II. INDIANA SUPREME COURT DECISIONS

A. Administrative Law and Procedure

Under the provisions of the Administrative Orders and Procedures Act (the “AOPA”),⁹ “[a] person may file a petition for judicial review . . . only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review.”¹⁰ Although Indiana courts “avoid applying the [exhaustion] doctrine in a mechanical fashion, [they] recognize its strong policy rationale and adhere to it closely.”¹¹

In *Johnson v. Celebration Fireworks, Inc.*,¹² the court held that because a fireworks wholesaler failed to exhaust its administrative remedies before seeking judicial review of the authority of the Indiana State Fire Marshal to require and issue certain permits and certificates, and to assess related fees, the trial court did not have subject matter jurisdiction to hear the suit.¹³ After a general discussion

4. IND. TRIAL R. 5(G)(1). The prior version of the Rule required that the entire document be tendered on light green paper.

5. IND. TRIAL R. 5(G)(1), (2). The prior version of the Rule required documents to be marked “Not for Public Access.”

6. IND. TRIAL R. 5(G).

7. IND. TRIAL R. 3.1(H).

8. *Id.*

9. IND. CODE §§ 4-21.5 (2005).

10. *Johnson v. Celebration Fireworks, Inc.*, 829 N.E.2d 979, 982 (Ind. 2005) (internal quotation marks omitted) (quoting IND. CODE § 4-21.5-5-4(a) (2004)).

11. *Id.* at 983.

12. *Johnson*, 829 N.E.2d 979.

13. *Id.* at 981, 984.

of the “exhaustion doctrine,”¹⁴ the court addressed and rejected the wholesaler’s argument that administrative review would have been “futile.”¹⁵

The court in *Celebration Fireworks* explained the “futility” exception to the exhaustion doctrine as follows:

While exhaustion of administrative remedies may be excused if the exercise would be futile, the exhaustion requirement . . . should not be dispensed with lightly on grounds of “futility.” To prevail upon a claim of futility, one must show that the administrative agency was powerless to effect a remedy or that it would have been impossible or fruitless and of no value under the circumstances.¹⁶

The court stated that the “principal thrust” of the wholesaler’s futility argument seemed to be that “it believes it to be inevitable that the agency would rule against it.”¹⁷ The court rejected the argument, explaining that “the mere fact that an administrative agency might refuse to provide the relief requested does not amount to futility.”¹⁸ The Indiana Supreme Court reversed the decision of the Indiana Court of Appeals and remanded the matter to the trial court, with instructions to dismiss the wholesaler’s complaint for lack of subject matter jurisdiction.¹⁹

B. Summary Judgment

In *Monroe Guaranty Insurance Co. v. Magwerks Corp.*,²⁰ the court held that summary judgment was not warranted in favor of Magwerks, the moving party, even if Monroe Guaranty, the non-moving party, failed to timely designate materials in opposition to the summary judgment motion.²¹ Magwerks moved for summary judgment, alleging, inter alia, that certain structural damage to its building caused by a period of heavy rain and snow caused its roof to “collapse”

14. *Id.* at 982-83.

15. *Id.* at 984.

16. *Id.* (internal citations and quotation marks omitted).

17. *Id.*

18. *Id.*

19. *Id.* Before evaluating the wholesaler’s “futility” argument, the court in *Celebration Fireworks* considered and rejected the wholesaler’s argument that exhaustion was not required because the agency’s actions were being challenged “as ultra vires and void.” *Id.* at 983. The court distinguished its decision in *Indiana Department of Environmental Management v. Twin Eagle LLC*, 798 N.E.2d 839 (Ind. 2003), in which it held that “exhaustion . . . was unnecessary ‘[t]o the extent the issue turns on statutory construction, [and] whether an agency possesses jurisdiction over a matter [as that] is a question of law for the courts.’” *Id.* (alteration in original) (quoting *Twin Eagle*, 798 N.E.2d at 844). The court in *Celebration Fireworks* explained that “there is absolutely no question in the present case of the [agency’s] legal authority to license fireworks wholesalers.” *Id.*

20. 829 N.E.2d 968 (Ind. 2005).

21. *Id.* at 975.

in several areas.²² As a result, Magwerks argued, the damages were covered by an insurance policy issued by Monroe Guaranty, which provided coverage for damage “involving collapse of a building or any part of a building.”²³ The trial court granted Magwerks’ summary judgment motion, the matter proceeded to trial, and, following a verdict in favor of Magwerks, Monroe Guaranty appealed.²⁴

On transfer to the Indiana Supreme Court, Magwerks argued, in part, that the trial court’s summary judgment order should be affirmed because Monroe Guaranty failed to timely file its designated evidence or submissions in opposition to the summary judgment motion.²⁵ Initially, the court in Magwerks recognized that “[w]hen a party fails to file a response [to a summary judgment motion] within thirty days, the trial court may not consider materials filed thereafter.”²⁶ However, the court ruled that “even assuming Monroe Guaranty’s submissions were untimely and thus inadmissible, Magwerks still [could not] prevail on this issue.”²⁷ After discussing the materials designated by Magwerks in support of its summary judgment motion, the court explained a moving party’s required burden as follows:

A party moving for summary judgment bears the initial burden of showing no genuine issue of material fact and the appropriateness of judgment as a matter of law. If the movant fails to make this *prima facie* showing, then summary judgment is precluded *regardless of whether the non-movant designates facts and evidence in response to the movant’s*

22. *Id.* at 971.

23. *Id.*

24. *Id.*

25. *Id.* at 973-74.

26. *Id.* at 974 (citing *Borsuk v. Town of St. John*, 820 N.E.2d 118, 124 n.5 (Ind. 2005); *Markley Enter., Inc. v. Grover*, 716 N.E.2d 559, 563 (Ind. Ct. App. 1999); *Carroll v. Jagoe Homes, Inc.*, 677 N.E.2d 612, 616 n.1 (Ind. Ct. App. 1997); *Seufert v. RWB Med. Income Properties I Ltd. Partnership*, 649 N.E.2d 1070, 1073 (Ind. Ct. App. 1995)); *see also* *Fort Wayne Lodge, LLC v. EBH Corp.*, 805 N.E.2d 876, 883 (Ind. Ct. App. 2004); *Desai v. Croy*, 805 N.E.2d 844, 850-51 (Ind. Ct. App. 2004); *Dorelli*, *supra* note 3, at 950-51 (discussing the *EBH Corp.* and *Desai* decisions). *But see* *Simon Prop. Group, L.P. v. Acton Enter., Inc.*, 827 N.E.2d 1235, 1239-40 (Ind. Ct. App.) (stating that “[t]he trial court, presented with successive motions for summary judgment and materials in opposition to summary judgment, relevant to the same factual circumstances, had discretion to grant [the non-movant] additional time to respond to the second summary judgment motion,” where the non-movant had “timely responded” to a previous motion for judgment on the pleadings that was converted to a summary judgment motion), *trans. denied*, 841 N.E.2d 186 (Ind. 2005). The court in *Simon* explained that “the circumstances were not such that a party wholly failed to defend against summary judgment until the applicable time period for response had lapsed and then belatedly presented new factual opposition to the trial court.” *Id.* at 1240. The *Simon* decision arguably supports an exception to the otherwise rigid mandate of Rule 56(I).

27. *Magwerks*, 829 N.E.2d at 974.

*motion.*²⁸

The court in *Magwerks* found that the evidence designated by Magwerks, the moving party, failed “to eliminate a genuine issue of material fact” and that “even if Monroe Guaranty’s designated materials were excluded from consideration as untimely, Magwerks’ failure to carry its initial burden . . . is fatal to [its] coverage claim.”²⁹ The court affirmed the opinion of the Indiana Court of Appeals, which reversed the trial court’s grant of summary judgment in favor of Magwerks.³⁰

C. Class Actions

Indiana Trial Rule 23(B) provides, *inter alia*, that:

[a]n action may be maintained as a class action if . . . the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.³¹

The language of subsection (B)(3) stating that certain questions must “predominate over any questions affecting only individual members” is commonly referred to as the “predominance requirement,” while the language requiring that “a class action is superior to other available methods for the fair and efficient adjudication of the controversy” is commonly referred to as the “superiority requirement.”³²

In *Associated Medical Networks, Ltd. v. Lewis*, the Indiana Supreme Court evaluated the “predominance” requirement for class certification under Rule 23(B)(3).³³ The plaintiffs in *Lewis*, a group of health care providers, brought an action to compel the defendant medical insurers to pay medical expenses under assignments executed by patients.³⁴ The plaintiffs sought certification as a class “to proceed on behalf of all other similarly situated health care providers.”³⁵

The trial court certified the class and, on interlocutory appeal, the Indiana Court of Appeals affirmed the certification order.³⁶ On transfer to the Indiana

28. *Id.* at 975 (emphasis added) (citing *Tankersley v. Parkview Hosp., Inc.*, 791 N.E.2d 201, 203-04 (Ind. 2003)).

29. *Id.*

30. *Id.*

31. *Associated Med. Networks, Ltd. v. Lewis*, 824 N.E.2d 679, 682 (Ind. 2005) (citing IND. TRIAL R. 23(B)(3)); *see also* *Ind. Bus. Coll. v. Hollowell*, 818 N.E.2d 943, 948-52 (Ind. Ct. App. 2004) (outlining “two-step procedure” for determination of propriety of class action certification under Trial Rule 23).

32. *See Lewis*, 824 N.E.2d at 682.

33. *Id.* at 681.

34. *Id.*

35. *Id.*

36. *Id.* at 682 (citing *Associated Med. Networks Ltd. v. Lewis*, 785 N.E.2d 230 (Ind. Ct. App.

Supreme Court, the defendants asserted that the trial court erroneously found that the plaintiffs satisfied the “predominance” and “superiority” requirements of Rule 23(B)(3).³⁷

Rejecting the plaintiffs’ argument that “predominance” is satisfied by a showing of a common course of conduct, the Indiana Supreme Court found that “there must be more than a mere nucleus of facts in common with the plaintiff class.”³⁸ The court explained that “[p]redominance requires more than commonality. Predominance cannot be established merely by facts showing a common course of conduct, but the common facts must also actually ‘predominate over any questions affecting only individual members.’”³⁹

The court in *Lewis* discussed with approval the Indiana Court of Appeals decision in *Wal-Mart Stores, Inc. v. Bailey*,⁴⁰ in which the court of appeals explained that “just because the claims may arise from ‘a common nucleus of operative facts’ does not mean that the common claims necessarily predominate.”⁴¹ Further, because Indiana Trial Rule 23 is based upon Rule 23 of the Federal Rules of Civil Procedure, the court considered interpretations and discussions by federal courts and commentators, quoting extensively from one federal treatise:

There is no precise test for determining whether common questions of law or fact predominate Instead, the Rule requires a pragmatic assessment of the entire action and all the issues involved. In making that assessment, courts have enunciated a number of standards, finding . . . predominance if:

- [1] The substantive elements of class members’ claims require the same proof for each class member;
- [2] The proposed class is bound together by a mutual interest in resolving common questions more than it is divided by individual interests.
- [3] The resolution of an issue common to the class would significantly advance the litigation.
- [4] One or more common issues constitute significant parts of each class member’s individual cases.
- [5] The common questions are central to all of the members’ claims.
- [6] The same theory of liability is asserted by or against all class members, and all defendants raise the same basic defenses.

2003), *vacated*, 824 N.E.2d 679 (Ind. 2005)).

37. *Id.*

38. *Id.* at 685.

39. *Id.* (quoting IND. TRIAL R. 23(B)(3)).

40. 808 N.E.2d 1198 (Ind. Ct. App. 2004), *reh’g denied, trans. denied*, 831 N.E.2d 742 (Ind. 2005); *see also* Dorelli, *supra* note 3, at 944-45 (discussing *Wal-Mart* decision).

41. *Lewis*, 824 N.E.2d at 685 (internal quotation marks omitted) (quoting *Wal-Mart*, 808 N.E.2d at 1204).

Courts generally agree that the predominance of common issues does not mean that common issues merely outnumber individual issues. Nor should a court determine predominance by comparing the time that the common issues can be anticipated to consume in the litigation to the time that individual issues will require. Otherwise, only the most complex common issues could predominate, because only complex issues tend to require more time to litigate.⁴²

The court in *Lewis* concluded that the defendants' conduct in directly paying patients of non-participating health care providers, rather than paying directly to the health care providers who have obtained assignment of benefits from the patients, "does not constitute a question of fact that predominates over the questions affecting only individual class members, as required by [Rule 23(B)(3)]."⁴³ The court reasoned that "[e]stablishing this common question will not establish any of the substantive elements of any of the class members' claims, nor will it advance the litigation in any respect."⁴⁴ Because the court perceived that "no economy of time, effort, or expense [would] be achieved" by maintaining the class, it reversed the trial court's certification order.⁴⁵

D. Declaratory Judgment and Equitable Defense of Laches

In *SMDfund, Inc. v. Fort Wayne-Allen County Airport Authority*,⁴⁶ the court determined that the plaintiffs' request for declaratory relief—challenging the constitutionality of a statute creating the Fort Wayne-Allen County Airport Authority (the "Authority")—was equitable in nature and, therefore, subject to the equitable defense of laches.⁴⁷ Specifically, the plaintiffs in *SMDfund* filed a complaint (1) seeking a declaration, inter alia, that the Authority was invalid and that it had no control over the airports in Fort Wayne, and (2) seeking an injunction preventing the Authority from closing Smith Field.⁴⁸ The Authority moved for summary judgment, arguing that the claims were barred by the statute

42. *Id.* at 686 (quoting 5 MOORE'S FEDERAL PRACTICE § 23.45[1], at 23-210 to 212).

43. *Id.*

44. *Id.*

45. *Id.* at 686-87. The court also rejected the plaintiffs' argument that predominance was satisfied by questions of law common to members of the plaintiff class. *Id.* Finally, because the court's conclusion on the predominance requirement was dispositive, the court did not separately address whether the "superiority" requirement was satisfied in the case. *Id.* at 687; *see also* Ind. Bus. Coll. v. Hollowell, 818 N.E.2d 943, 948-52 (Ind. Ct. App. 2004) (discussing the two-step analysis for determining the propriety of class action certification under Rule 23(A) and (B)(3), but providing limited analysis of the "predominance" and "superiority" requirements).

46. 831 N.E.2d 725 (Ind. 2005), *cert. denied sub nom.* Tocci v. Ft. Wayne-Allen County Airport Auth., 126 S. Ct. 1051, *and reh'g denied*, 126 S. Ct. 1459 (2006).

47. *Id.* at 728-29.

48. *Id.* at 727-28.

of limitations and by the equitable doctrine of laches.⁴⁹ The trial court granted the Authority's motion, based on the statute of limitations.⁵⁰ The plaintiffs appealed and sought transfer to the Indiana Supreme Court, bypassing the court of appeals pursuant to Rule 56(A) of the Indiana Rules of Appellate Procedure.⁵¹

On transfer, the Indiana Supreme Court first determined that the plaintiffs' claims were both "grounded in equity."⁵² The court explained that "[a] declaratory judgment is not necessarily either equitable or legal."⁵³ Rather, the court continued, it "is a statutory creation, and by its nature is neither fish nor fowl, neither legal nor equitable."⁵⁴ The court described the test as follows: "The status of a declaratory judgment as legal or equitable is determined by the nature of the suit. The test is whether, in the absence of a prayer for declaratory judgment, the issues presented should be properly disposed of in an equitable as opposed to a legal action."⁵⁵

The court in *SMDfund* found that the plaintiffs' request for a declaration that the Authority is invalid and has no control over the airports in Fort Wayne was "the functional equivalent of an injunction against the Authority's operation as an established airport authority."⁵⁶

Because the court determined that the plaintiffs' action was equitable in nature, it proceeded to evaluate whether laches operated to bar the claim. The court explained that "[i]ndependently of any statute of limitation, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them."⁵⁷ To establish the defense of laches, a defendant must demonstrate: "(1) inexcusable delay in asserting a known right; (2) an implied waiver arising from knowing acquiescence in existing conditions; and (3) a change in circumstances causing prejudice to the adverse party."⁵⁸

49. *Id.* at 728. The Authority also argued that the Public Lawsuit Act deprived the court of jurisdiction over the plaintiffs' claims. *Id.* The trial court granted the Authority's motion on other grounds and, therefore, the Public Lawsuit Act was not addressed further by the Indiana Supreme Court.

50. *Id.*

51. *Id.* IND. APP. R. 56(A) provides that

[i]n rare cases, the Supreme Court may, upon verified motion of a party, accept jurisdiction over an appeal that would otherwise be within the jurisdiction of the Court of Appeals upon a showing that the appeal involves a substantial question of law of great public importance and that an emergency exists requiring a speedy determination.

52. *SMDfund*, 831 N.E.2d at 728-29.

53. *Id.* at 728.

54. *Id.* (internal quotation marks omitted) (quoting *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 824 (2d Cir. 1968)).

55. *Id.* (internal citations and quotation marks omitted).

56. *Id.*

57. *Id.* at 729 (internal quotation marks omitted) (quoting *Penn Mut. Life Ins. Co. v. City of Austin*, 168 U.S. 685, 698 (1898)).

58. *Id.* (internal quotation marks omitted) (quoting *Shafer v. Lambie*, 667 N.E.2d 226, 231 (Ind. Ct. App. 1996)).

The statute challenged by the plaintiffs in *SMDfund* was enacted in 1985, more than seventeen years before the plaintiffs filed suit.⁵⁹ The court stated that “[s]eventeen years is surely an unreasonable delay, but laches does not turn on time alone.”⁶⁰ Rather, the court explained, “unreasonable delay which causes prejudice or injury is necessary.”⁶¹ “[I]f a party, with knowledge of the relevant facts, permits the passing of time to work a change of circumstances by the other party, laches may bar the claim.”⁶²

The court concluded that the Authority established that “it would be prejudiced if [the] suit were allowed to proceed.”⁶³ Specifically, according to the court, the prejudice occurred “when the Authority in reliance on the statute issued bonds and again when it took over operation of Smith Field.”⁶⁴ In support of its conclusion, the court quoted the U.S. Supreme Court in *Penn Mutual Life Insurance Co. v. City of Austin*: “[W]here a public expenditure has been made, or a public work undertaken, and where one, having full opportunity to prevent its accomplishment, has stood by and seen the public work proceed, a court of equity will more readily consider laches.”⁶⁵ In light of the fact that the Authority had “incurred debt exceeding \$44 [million] and has entered into a variety of leases, contracts, and other obligations, some of which extended for sixty-eight years into the future,” the court “readily [found] laches in [the plaintiffs’] seventeen-year delay.”⁶⁶

III. INDIANA COURT OF APPEALS DECISIONS

A. Administrative Law and Procedure

In *Sun Life Assurance Co. of Canada v. Indiana Comprehensive Health Insurance Ass’n*,⁶⁷ the court rejected the plaintiff’s argument that, pursuant to the doctrine of “primary jurisdiction,” it was not required to exhaust its administrative remedies before seeking judicial review of an agency determination.⁶⁸ The doctrine of primary jurisdiction was explained by the

59. *Id.*

60. *Id.* at 731.

61. *Id.* (internal quotation marks omitted) (quoting *Shafer*, 667 N.E.2d at 231).

62. *Id.* (internal quotation marks omitted) (quoting *State ex rel. Att’y Gen. v. Lake Superior Court*, 820 N.E.2d 1240, 1256 (Ind.), *cert. denied*, 126 S. Ct. 398 (2005)).

63. *Id.*

64. *Id.*

65. *Id.* (internal quotation marks omitted) (quoting *Penn Mut. Life Ins. Co. v. City of Austin*, 168 U.S. 685, 698 (1898)).

66. *Id.* Because the court found that laches barred the plaintiffs’ claims, it did not address the statute of limitations issue, which was the basis of the trial court’s original ruling reaching the same result. *Id.* at 732.

67. 827 N.E.2d 1206 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 186 (Ind. 2005).

68. *Id.* at 1213.

Indiana Supreme Court in *Austin Lakes Joint Venture v. Avon Utilities, Inc.*,⁶⁹ as follows:

The doctrine [of primary jurisdiction] comes into play when a claim is cognizable in a court but adjudication of the claim “requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of [an] administrative body”

....

[I]n order to determine whether a case is properly before the trial court, the court should examine each issue presented by the case. If at least one of the issues involved in the case is within the jurisdiction of the trial court, the entire case falls within its jurisdiction, even if one or more of the issues are clearly matters for exclusive administrative or regulatory agency determination. Where at least one of the issues or claims is a matter for judicial determination or resolution, the court is not ousted of subject matter jurisdiction by the presence in the case of one or more issues which arguably are within the jurisdiction of an administrative or regulatory agency.⁷⁰

In *Sun Life*, the plaintiff was an insurer, seeking an injunction against the Indiana Comprehensive Health Insurance Association. The court found that the sole issue raised by the plaintiff—whether the plaintiff was a member of the Association—was an issue within the exclusive jurisdiction of the Association.⁷¹ As explained by the court in *Austin Lakes*, “the doctrine of primary jurisdiction applies only when there is at least one issue before the court that is a matter of judicial determination.”⁷² The court, therefore, affirmed the trial court’s decision to dismiss the plaintiff’s complaint for lack of subject matter jurisdiction.⁷³

B. Pleadings

1. *Definition of “Pleadings.”*—In *Wachstetter v. County Properties, LLC*,⁷⁴ the court held that a subcontractor holding a mechanic’s lien failed to satisfy the statutory requirement of filing a “complaint” within one year of the recording of the lien,⁷⁵ by filing a “motion to intervene” in a foreclosure action filed by a

69. 648 N.E.2d 641 (Ind. 1995).

70. *Sun Life*, 827 N.E.2d at 1212 (alteration in original) (quoting *Austin Lakes*, 648 N.E.2d at 646).

71. *Id.* at 1213.

72. *Id.* (stating that “the trial court has to have subject matter jurisdiction over at least one claim before it can exercise jurisdiction and refer claims to an agency under the doctrine of primary jurisdiction”).

73. *Id.*

74. 832 N.E.2d 574 (Ind. Ct. App.), *reh’g denied* (Ind. Ct. App. 2005), *trans. denied* (Ind. 2006).

75. Section 32-8-3-6 (2005) of the Indiana Code provides, in pertinent part, as follows:
[a]ny person having such [mechanic’s] lien may enforce the same by filing his

mortgagee against the property owner.⁷⁶ Specifically, the mortgagee filed its foreclosure suit against the property owner in July 1998.⁷⁷ On December 1, 1998, the subcontractor recorded its mechanic's lien.⁷⁸ On March 29, 1999, the subcontractor filed a motion to intervene, based on the mechanic's lien.⁷⁹ However, the subcontractor did not file a cross-claim against the property owner until October of 2000—almost two years after the mechanic's lien was recorded.⁸⁰ Later, after the trial court granted summary judgment for the mortgagee on the ground that the subcontractor failed to timely foreclose his lien, the subcontractor moved to amend his “pleadings” to include a mechanic's lien claim against the mortgagee's assignee.⁸¹ The trial court denied the motion to amend.⁸²

In rejecting the subcontractor's argument that his proposed amendment should relate back to the date of his motion to intervene, the court in *Wachstetter* explained that, pursuant to Indiana Trial Rule 7(A), “pleadings shall consist of: (1) a complaint and an answer; (2) a reply to a denominated counterclaim; (3) an answer to a cross-claim; (4) a third-party complaint . . . ; and (5) a third-party answer.”⁸³ Further, the court recognized that a motion is “an application to the court for an order.”⁸⁴ The court stated that “[t]o equate a motion to intervene with a complaint is to stretch the rules beyond reason.”⁸⁵ Therefore, the court concluded that any amendment would have related back only to the date of the subcontractor's cross-claim, which “was filed too late to preserve a right to enforce his mechanic's lien.”⁸⁶

Practitioners often identify various filings as “pleadings” without regard to

complaint in the circuit or superior court of the county where the real estate or property on which the lien is so taken is situated, at any time within one (1) year from the time when said notice has been received for record by the recorder of the county . . . and if said lien shall not be enforced within the time prescribed by this section, the same shall be null and void.

Wachstetter, 832 N.E.2d. at 579 (quoting IND. CODE § 32-8-3-6 (2005)).

76. *Id.* at 578-79.

77. *Id.* at 576.

78. *Id.*

79. *Id.* at 577.

80. *Id.*

81. *Id.*

82. *Id.* The trial court also denied the subcontractor's motion to reconsider its requirement of strict compliance with the one-year enforcement period. *Id.*

83. *Id.* at 578 (quoting IND. TRIAL R. 7(A)).

84. *Id.* (quoting IND. TRIAL R. 7(B)).

85. *Id.*

86. *Id.* The court also rejected the subcontractor's arguments that summary judgment was improper, finding that (1) the motion to intervene did not satisfy the statutory requirement for the filing of a “complaint” within the one-year period; (2) the filing of the motion to intervene did not toll the one-year enforcement period; and (3) the filing of the motion to intervene did not constitute “substantial compliance” with the mechanic's lien statute. *See id.* at 579-81.

the express definition contained in Rule 7(A). The *Wachstetter* decision serves as a reminder that to do so may result in prejudice to the case—i.e., terminology and definitions within the Trial Rules should be more carefully considered.

2. *Notice Pleading*.—In *Tobin v. Ruman*,⁸⁷ a minority shareholder in a law firm organized as a professional corporation filed a complaint against the firm and the firm's majority shareholder, alleging breach of an oral contract, fraud, and other claims.⁸⁸ In his motion for partial summary judgment, the plaintiff argued that the defendants' failure to pay him his share of the firm's retained earnings constituted, inter alia, "criminal conversion," entitling him to recover treble damages under Indiana's crime victim's statute.⁸⁹ In his complaint, the plaintiff had alleged that the failure amounted only to a breach of contract.⁹⁰ The trial court granted the plaintiff's summary judgment motion on the conversion claim and awarded him treble damages.⁹¹ The defendants appealed, arguing, in part, that the plaintiff failed to plead a conversion claim or a claim under the crime victim's statute in his complaint.⁹²

The court in *Ruman* disagreed, explaining that "in Indiana, plaintiffs need not identify any specific theory of recovery; rather, they must only state sufficient operative facts as to put defendants on notice as to their claims."⁹³ The court found that the plaintiff "stated sufficient operative facts . . . so as to put [the defendants] on notice as to his claims, and his failure to include a count specifying conversion and damages pursuant to the crime victim's compensation statute does not prevent him from recovering."⁹⁴

C. Service of Process

1. *Service on Former Director of Dissolved Corporation*.—In *Munster v. Groce*,⁹⁵ the court of appeals held as a matter of first impression that "in the case of a dissolved corporation, it is appropriate to serve process upon a former director of the corporation [who was a director of the corporation] at the time of

87. 819 N.E.2d 78 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 747 (Ind. 2005).

88. *Id.* at 83.

89. *Id.* at 88.

90. *Id.*

91. *Id.*

92. *Id.* at 89 n.7.

93. *Id.* (citing *Binninger v. Hendricks County Bd. of Zoning Comm'rs*, 668 N.E.2d 269, 272 (Ind. Ct. App. 1996)).

94. *Id.* The court in *Ruman* proceeded, however, to reverse the trial court's decision on the criminal conversion claim, finding that the defendants' "wrongful withholding of [the] funds from [the plaintiff] is, at most, the failure to pay a debt, which does not constitute criminal conversion as a matter of law." *Id.* at 89 (citing *Huff v. Biomet, Inc.*, 654 N.E.2d 830, 836 (Ind. Ct. App. 1995)). Therefore, the court held that the crime victim's compensation statute did not apply and the plaintiff was not entitled to treble damages. *Id.*

95. 829 N.E.2d 52 (Ind. Ct. App. 2005).

its dissolution.”⁹⁶ Recognizing that “[t]he question of how to serve a defunct corporation . . . has not previously been addressed by Indiana case law[,]” the court determined that “[t]he trial rules and Indiana Business Corporation Law . . . provide sufficient guidance for how to resolve [the] issue.”⁹⁷

The court found that service was proper at the former director’s residence.⁹⁸ Rule 4.6(B) provides that service on a corporate representative generally cannot be made at the person’s residence.⁹⁹ However, the court reasoned that in the case of a dissolved corporation, service at the director’s residence was proper because the corporation “no longer has a business address.”¹⁰⁰

Finally, the court found that service was effective, despite that the summons was directed only to the dissolved corporation, not to the individual director “or any other person, such as a ‘director’ or ‘officer’ of [the corporation].”¹⁰¹ The court distinguished its decision in *Volunteers of America v. Premier Auto*,¹⁰² in which the court held that “service upon Volunteers of America (“VOA”) was ineffective because none of the initial attempts were directed to a person; instead, the summonses were simply addressed to ‘Volunteers of America.’”¹⁰³ The court in *Munster* distinguished the circumstances in *Volunteers of America*, explaining as follows:

[*Volunteers of America*] concerned mailings to VOA’s office that subsequently were never brought to the attention of a high-ranking corporate officer. Here, by contrast, the summons and complaint were delivered directly to [the director’s] residence and he acknowledged receipt of them; there was no chance that the summons and complaint would fail to follow the proper internal corporate channels to a high-ranking officer or director because they were delivered directly to a director.¹⁰⁴

96. *Id.* at 62-63 (citing *Warren v. Dixon Ranch Co.*, 260 P.2d 741, 743 (Utah 1953)).

97. *Id.* at 62.

98. *Id.* at 63.

99. *Id.* (discussing IND. TRIAL R. 4.6(A) & (B)).

100. *Id.* The court also found service proper, despite that the summons and complaint were left with the director’s wife, and despite that it was not followed by service by mail to the director’s residence. *Id.* With regard to follow-up service by mail, the court stated that “failure to follow up delivery of a complaint and summons under Trial Rule 4.1(A)(3) with mailing of a summons under Trial Rule 4.1(B) does not constitute ineffective service of process if the subject of the summons does not dispute actually having received the complaint and summons.” *Id.* (citing *Boczar v. Reuben*, 742 N.E.2d 1010, 1016 (Ind. Ct. App. 2001)).

101. *Id.* at 63-64.

102. 755 N.E.2d 656 (Ind. Ct. App. 2001).

103. *Munster*, 829 N.E.2d at 63 (citing *Volunteers of Am.*, 755 N.E.2d at 660). The court in *Volunteers of America* also held that the defect in service was not saved by Rule 4.15(F), which provides that service will not be deemed insufficient, when it is “reasonably calculated to inform the person [being] served.” *Id.* at 63-64.

104. *Id.* at 64.

The court found that “even if there was a technical defect in the summons . . . , the method of service by delivery at [the director’s] residence still was reasonably calculated to inform [the dissolved corporation] of the pending lawsuit and, in fact, did provide such notice.”¹⁰⁵ The court of appeals reversed the trial court’s dismissal of the complaint as to the dissolved corporation.¹⁰⁶

2. “Joint” Summons Ineffective.—In *Allburn v. State ex rel. Warrick County Sheriff’s Department*,¹⁰⁷ the court applied a “bright line rule” that “[o]ne copy of a joint summons delivered to a residence where two parties to the suit reside does not constitute proper service.”¹⁰⁸ Therefore, the court held that the trial court lacked jurisdiction to enter and enforce a judgment against a defendant, where a single summons was addressed to both the defendant and her husband, who was a co-defendant, at their residence.¹⁰⁹

In *Allburn*, the defendant alleged that she never received a copy of the summons. The court’s ruling arguably leaves open whether service on the husband was ineffective, despite his receipt of the summons, simply because the summons was jointly addressed to both defendants.

D. Personal Jurisdiction

In 2003, Rule 4.4(A)—Indiana’s “long arm” jurisdiction statute—was amended to include the following language: “In addition, a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitutions of this state or the United States.”¹¹⁰ In *Litmer v. PDQUSA.com*,¹¹¹ the U.S. District Court for the Northern District of Indiana determined that the 2003 amendment to Rule 4.4(A) makes Indiana’s long-arm statute coextensive with the limits of due process, allowing the courts to collapse the prior “two-step analysis” into a single inquiry: whether the exercise of personal jurisdiction comports with due process.¹¹²

In *Pozzo Truck Center, Inc. v. Crown Beds, Inc.*,¹¹³ however, the Indiana Court of Appeals disagreed with the court in *Litmer*, stating that Indiana courts will continue to apply the two-step analysis, “first determining whether the conduct falls under the long-arm statute and then whether it comports with the Due Process Clause as interpreted by the United States Supreme Court and courts

105. *Id.*

106. *Id.*

107. 826 N.E.2d 682 (Ind. Ct. App.), *trans. denied sub nom.* *Allburn v. Warrick County Sheriff’s Dep’t*, 841 N.E.2d 181 (Ind. 2005).

108. *Id.* at 684-85 (internal quotation marks omitted) (quoting *Idlewine v. Madison County Bank & Trust Co.*, 439 N.E.2d 1198, 1201 (Ind. Ct. App. 1982)).

109. *Id.* at 685.

110. IND. TRIAL R. 4.4(A).

111. 326 F. Supp. 2d 952 (N.D. Ind. 2004).

112. *Id.* at 955.

113. 816 N.E.2d 966 (Ind. Ct. App. 2004).

in this state.”¹¹⁴ The court explained that “if Indiana’s long-arm statute was intended to be coextensive with the limits of personal jurisdiction under the Due Process Clause, the enumerated acts listed in Rule 4.4(A) could have been deleted and the Rule could have been rewritten with general language.”¹¹⁵

The court in *Pozzo* first found that the defendant’s contacts fell under Rule 4.4(A)(4), which provides that an organization “submits to the jurisdiction of the courts of this state as to any action arising from . . . having supplied or contracted to supply services rendered or to be rendered or goods or materials furnished or to be furnished in this state.”¹¹⁶ Without discussion of the facts in the case, the court apparently found that Rule 4.4(A)(4) applied, satisfying Indiana long-arm jurisdiction.

The court proceeded to “examine whether asserting jurisdiction violates the Due Process Clause of the Fourteenth Amendment.”¹¹⁷ In examining the issue, the court stated, “we must determine 1) whether there are minimum contacts between [the defendant] and Indiana, and 2) whether asserting personal jurisdiction over [the defendant] offends ‘traditional notions of fair play and substantial justice.’”¹¹⁸ The court found that the defendant established “minimum contacts” with the state of Indiana because it performed the work that was at issue in the case specifically for an Indiana corporation.¹¹⁹ The court explained that the defendant “had full knowledge that [the plaintiff] was an Indiana corporation” and that the defendant’s contacts were such “that it should have reasonably anticipated being haled into an Indiana court to adjudicate a dispute over the work it performed for [the plaintiff].”¹²⁰

Finally, the court in *Pozzo* found that asserting jurisdiction over the defendant comported “with traditional notions of fair play and substantial justice,” because any inconvenience to the defendant was “outweighed by [the plaintiff’s] interest in adjudicating the dispute in the forum where the damage was realized and [by] Indiana’s interest in protecting its business owners from defective services.”¹²¹ The court also found it persuasive that there did “not appear to be more witnesses in the [defendant’s home state] than in Indiana,” that litigating in Indiana was no more expensive or inconvenient, and that “it [did] not appear that any substantive social policies [would] be affected by the outcome of this controversy.”¹²²

114. *Id.* at 969 n.2.

115. *Id.* Arguably, however, the enumerated acts may have been included in the amended Rule as specific but non-exhaustive bases for a finding of constitutional due process.

116. *Id.* at 969 (quoting IND. TRIAL R. 4.4(A)(4)).

117. *Id.* at 970.

118. *Id.* (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

119. *Id.* at 971.

120. *Id.*

121. *Id.*

122. *Id.*

E. Venue

1. *Preferred Venue*.—In *Monroe Guaranty Insurance Co. v. Berrier*,¹²³ the Indiana Court of Appeals held as a matter of first impression that the county in which a judgment is located is a county of preferred venue for a subsequent claim against the judgment defendant's insurer for failure to settle the underlying claim.¹²⁴ The plaintiff in the underlying matter sued the defendant in Porter County, for injuries sustained at a health club owned and operated by the defendant.¹²⁵ The Porter County court entered judgment on a jury verdict in the amount of \$8.1 million.¹²⁶ Because the damages award exceeded the \$1 million policy limits on the defendant's insurance policy, the defendant assigned the plaintiff its claims against the insurer.¹²⁷

The plaintiff in the underlying litigation sued the insurer in Porter Superior Court, alleging bad faith in the insurer's failure to settle the prior litigation.¹²⁸ The insurer filed a motion to dismiss or, in the alternative, to transfer venue, arguing that preferred venue was in Hamilton County, where its principal office was located.¹²⁹ The plaintiff responded, arguing that under Indiana Trial Rule 75(A)(2), the underlying judgment was a "chattel" located in Porter County. The trial court agreed, denying the insurer's motion, and the insurer appealed.¹³⁰

The appellate court initially recognized that "[i]t is possible that more than one county may be a county of preferred venue" and that Rule 75(A) creates no preference among the preferred venue criteria it enumerates.¹³¹ "Thus, if suit is initially filed in a county of preferred venue, a trial court may not transfer venue."¹³²

The court in *Berrier* explained that "actual damages are an essential element of a claim against an insurer for failure to settle" and that "[t]he excess liability constitutes the actual damages" in a such a case.¹³³ The court concluded that "the underlying judgment is essential to demonstrating the actual damages sustained, and thus, the current action relates to the chattel under the clear and unambiguous language of Rule 75(A)(2)."¹³⁴ In short, the court held that in a claim against an insurer for bad faith failure to settle the underlying matter, the county in which the underlying judgment is entered is a preferred venue, pursuant to Rule

123. 827 N.E.2d 158 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 183 (Ind. 2005).

124. *Id.* at 161.

125. *Id.* at 159.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 160.

132. *Id.*

133. *Id.* at 161 (citing *Allstate Ins. Co. v. Axsom*, 696 N.E.2d 482, 485 (Ind. Ct. App. 1998)).

134. *Id.*

75(A)(2).¹³⁵

2. *Jurisdiction of Court upon Change of Venue*.—In *Scott v. Consolidated City of Indianapolis*,¹³⁶ the Indiana Court of Appeals found that a trial court retained jurisdiction to reconsider its previously granted order for change of venue, which had been granted before the non-moving party had an opportunity to respond, because at the time jurisdiction was vacated, it “had not been vested in any other court.”¹³⁷ The court in *Scott* rejected the movant’s argument that the trial court was divested of jurisdiction to hear anything but “emergency matters” once the change of venue motion was filed and granted.¹³⁸ Specifically, the court affirmed the trial court’s decision that an order for change of venue should be vacated “because the order was entered prior to the [non-moving parties] having an opportunity to respond as provided in the local rules.”¹³⁹

The court in *Scott* recognized that “[r]elatively few Indiana cases have addressed whether a trial court may entertain a motion to vacate a change of venue order, or even whether the issue may be addressed sua sponte.”¹⁴⁰ In determining that the trial court properly reconsidered the order for change of venue, the court explained that: “[a] court has inherent power to control its own orders. It is therefore perfectly proper for a trial court to reconsider a previous order, and to vacate it, or make a modified or contrary order while the case is still in fieri.”¹⁴¹ The court of appeals affirmed that the trial court had jurisdiction to reconsider and vacate the order for change of venue.¹⁴²

The court in *Scott* proceeded to analyze whether Trial Rule 76(A) mandated venue in a county other than Marion County, based on the argument that Marion County was a party to the action.¹⁴³ The court, addressing an issue of first impression,¹⁴⁴ found that Unigov legislation allowed the “continued existence of

135. See IND. TRIAL R. 75(A)(2).

136. 833 N.E.2d 1094 (Ind. Ct. App. 2005), *trans. denied* (Ind. 2006).

137. *Id.* at 1098.

138. *Id.* at 1098 n.7. Rule 78 provides that once a certified copy of a change of venue order is filed in the court to which the change has been made, “such court shall have full jurisdiction of said cause.” IND. TRIAL R. 78. Further, Rule 78 provides that “[n]othing in this rule shall be construed as divesting the original court of its jurisdiction to hear and determine emergency matters between the time that a motion for change of venue is filed and the time that the court grants an order for the change of venue.” *Id.*

139. *Id.* at 1096. Marion Circuit and Superior Court Civil Division Rule 5.1(B) provided at the relevant time as follows: “Unless otherwise provided, a party shall have fifteen (15) days from the date of filing to file a response to a motion, other than a motion for a continuance or enlargement of time.” Marion Circuit and Superior Court Civil Division Rule 5.1(B).

140. *Scott*, 833 N.E.2d at 1097.

141. *Id.* (alteration in original and internal quotation marks omitted) (quoting *Metro. Dev. Comm’n of Marion County v. Newlon*, 297 N.E.2d 483, 484 (Ind. Ct. App. 1973)).

142. *Id.* at 1098.

143. *Id.* at 1097 n.4 (noting that Trial Rule 76(A) provides that a motion for a change of venue “shall be granted only upon a showing that the county where suit is pending is a party”).

144. *Id.* at 1099.

some government functions by the county such that the Marion County government is separate from the City.”¹⁴⁵ As such, the court of appeals found that “[a]ccording to the plain reading of Trial Rule 76, . . . the trial court did not abuse its discretion in denying the change of venue.”¹⁴⁶ In other words, the court found that, at least for purposes of Rule 76(A), Marion County maintains an identity separate from that of the City of Indianapolis, despite the creation and implementation of Unigov. Because the county was not a party to the litigation, change of venue was not automatic under Rule 76(A).¹⁴⁷

F. Statute of Limitations—Equitable Estoppel

In *Binder v. Benchwarmers Sports Lounge*,¹⁴⁸ the court held that the defendant was equitably estopped from asserting a statute of limitations defense to a negligence claim, where the defendant’s attorney led plaintiff’s counsel to believe that the defendant would not contest the plaintiff’s status as an “employee.”¹⁴⁹ Prior to the expiration of the two-year statute of limitations on the negligence claim, counsel for the plaintiff delivered a letter to counsel for the defendant, asking whether the defendant was “denying [that the plaintiff] was an employee at the time of the alleged injury[.]”¹⁵⁰ Counsel for the defendant responded, stating that “it is my client’s position that your client was not acting in the course and scope of his employment at the time of the alleged injury.”¹⁵¹

After the statute of limitations had passed, the owner of the corporate defendant alleged for the first time, during a deposition in the worker’s compensation proceeding, that the plaintiff was not an “employee” at the time of the incident.¹⁵² The plaintiff subsequently filed its complaint in this matter, the defendant answered and raised the statute of limitations as a defense, and, ultimately, the trial court dismissed the complaint based on the statute of limitations.¹⁵³

The court in *Binder* stated that “[i]t is apparent to us that [the defendant] was intentionally trying to conceal its position in the worker’s compensation matter until the statute of limitations expired on any possible tort action.”¹⁵⁴ In rejecting the defendant’s contention that “[a] defendant has no obligation to disclose its

145. *Id.* at 1101.

146. *Id.*

147. *See id.*

148. 833 N.E.2d 70 (Ind. Ct. App. 2005).

149. *Id.* at 73-74. The plaintiff in *Binder* was working in the bar and was injured during his attempt to break up a fight. The plaintiff timely filed an Application for Adjustment of Claim with the Indiana Worker’s Compensation Board. *Id.* at 72.

150. *Id.* at 72.

151. *Id.*

152. *Id.*

153. *Id.* at 72-73.

154. *Id.* at 76.

defenses to a lawsuit, other than affirmative defenses[,] . . .”¹⁵⁵ the court stated that “[a] defendant does have an obligation not to make a material misrepresentation[,] [and] [e]ven more than that, [counsel for the defendant], as an attorney, is held to a higher standard.”¹⁵⁶

The court explained the rationale for such a standard as follows:

We decline to require attorneys to burden unnecessarily the courts and litigation process with discovery to verify the truthfulness of material representations made by opposing counsel. The reliability of lawyers’ representations is an integral component of the fair and efficient administration of justice. The law should promote lawyers’ care in making statements that are accurate and trustworthy and should foster the reliance upon such statements by others.¹⁵⁷

The court in *Binder* also rejected the defendant’s contention that the plaintiff had access to the same factual information as the defendant regarding his employment status.¹⁵⁸ The court clarified that the material representation was *not* whether the plaintiff was an “employee.” Rather, it was whether the defendant “would dispute whether [the plaintiff] was an employee or not.”¹⁵⁹ The court concluded that counsel for the defendant “made a material representation to [the plaintiff’s] counsel concerning whether [the defendant] would contest [the plaintiff’s] status as an employee, causing [the plaintiff] to miss the statute of limitations deadline for his tort suit against [the defendant].”¹⁶⁰ Thus, the court held that the defendant was “equitably estopped from asserting the statute of limitations defense.”¹⁶¹

G. Dismissal

1. *Voluntary Dismissal.*—In *Principal Life Insurance Co. v. Needler*,¹⁶² Fabias Shipman stabbed and robbed Needler after Needler had cashed a check at his bank.¹⁶³ Needler filed suit against the bank, alleging negligence in its failure to prevent the attack and failure to adequately train and supervise its employees.¹⁶⁴ Needler initially demanded \$250,000 from the bank, but ultimately accepted \$49,000, due to questions regarding liability.¹⁶⁵

Principal Life, Needler’s insurer, claimed “it was entitled to a lien against the

155. *Id.* at 75.

156. *Id.*

157. *Id.* (citing *Fire Ins. Exch. v. Bell*, 643 N.E.2d 310, 313 (Ind. 1994)).

158. *Id.* at 76.

159. *Id.*

160. *Id.*

161. *Id.*

162. 816 N.E.2d 499 (Ind. Ct. App. 2004).

163. *Id.* at 501.

164. *Id.*

165. *Id.*

settlement amount, for . . . medical bills it had paid on Needler's behalf, less a pro rata share of attorney fees and litigation expenses."¹⁶⁶ Needler claimed "the amount of the lien should be reduced because he did not recover the full value of his total claim due to the settlement and an inability to collect from [the assailant]."¹⁶⁷ Thus, Needler filed a "Motion to Adjudicate Lien," pursuant to the Indiana Lien Reduction Statute.¹⁶⁸ The trial court held a hearing and after argument of counsel, "expressed its belief that a separate declaratory judgment action by Needler would be 'the most logical' way to resolve the dispute."¹⁶⁹ Needler's attorney made an oral motion to voluntarily dismiss the motion, which the trial court granted over Principal Life's objection.¹⁷⁰

Rule 41(A)(2) "permits a plaintiff to voluntarily dismiss an action without prejudice after a responsive pleading or motion for summary judgment has been filed, but only pursuant to court order."¹⁷¹ Generally, dismissal under Rule 41(A)(2) "should be allowed unless the defendant will suffer some legal prejudice other than the mere prospect of a second lawsuit."¹⁷² Because Indiana's Rule 41(A) is identical to Rule 41(A) of the Federal Rules, the court in *Principal Life* looked to federal authority for guidance:

Legal prejudice is shown when actual legal rights are threatened or when monetary or other burdens appear to be extreme or unreasonable

[T]he factors most commonly considered on a motion for a voluntary dismissal are: (1) the extent to which the suit has progressed, including the defendant's effort and expense in preparing for trial, (2) the plaintiff's diligence in prosecuting the action or in bringing the motion, (3) the duplicative expense of relitigation, and (4) the adequacy of plaintiff's explanation for the need to dismiss. Other factors that have been cited include whether the motion is made after the defendant has made a dispositive motion or at some other critical juncture in the case and any vexatious conduct or bad faith on plaintiff's part.¹⁷³

Further, "where a hearing has been conducted on an issue that goes to the merits of the controversy, voluntary dismissal is inappropriate."¹⁷⁴

After finding that the hearing did not go to the merits of the controversy,¹⁷⁵

166. *Id.*

167. *Id.*

168. *Id.*; see IND. CODE § 34-51-2-19 (2005).

169. *Id.* at 502.

170. *Id.*

171. *Id.*

172. *Id.* (internal quotation marks omitted) (quoting *Rose v. Rose*, 526 N.E.2d 231, 234 (Ind. Ct. App. 1988)).

173. *Id.* at 503 (alterations in original) (quoting 8 MOORE'S FEDERAL PRACTICE § 41.40[6], at 41-140 to -142 (3d ed. 2003)).

174. *Id.* (citing *Rose*, 526 N.E.2d at 235).

175. *Id.*

the court in *Principal Life* affirmed the trial court's grant of Needler's oral motion to dismiss, ultimately finding that Principal Life failed to demonstrate legal prejudice.¹⁷⁶ The court rejected Principal Life's argument that it suffered prejudice by preparing for the hearing and because "it will be subjected to a second action."¹⁷⁷ The court stated that Principal Life failed to demonstrate "clear legal prejudice caused by the . . . dismissal, such as the nullification of favorable rulings or substantial expense beyond the creation of work product that should be transferable to the declaratory judgment action."¹⁷⁸ The court found that the trial court did not abuse its discretion in granting the plaintiff's motion to dismiss.¹⁷⁹

2. *Involuntary Dismissal.*—In *Office Environments, Inc. v. Lake States Insurance Co.*,¹⁸⁰ the appellate court affirmed the trial court's dismissal of the case pursuant to Indiana Trial Rule 41(E) due to the plaintiff's failure to comply with a court order requiring mediation of the case.¹⁸¹ The court reasoned that the "complaint had been on the court's docket for over three years," the "trial court first ordered the parties to mediate . . . over two and one-half years before it dismissed the case"; the plaintiff had caused the mediation to be rescheduled at least three times, during which time the jury trial was continued four times, and the plaintiff never sought relief from the order to mediate the case.¹⁸²

In his dissent, Judge May commented on mandatory mediation, which is sometimes futile:

Many counties require mediation in all civil cases, and I do not believe that is a good practice. Some cases simply cannot be productively dealt with through mediation. When mediation is imposed without any inquiry into whether that process suits the dispute or the litigants, parties will often be ordered into mediation when both sides (and perhaps the judge, as well) know the process will be futile. In some situations, like the one before us, a party alleges its financial difficulties are attributable to an act or omission by the other party. Forcing the financially challenged party into mediation, and forcing that party to pay mediation costs, will often be counter-productive.¹⁸³

The majority agreed that mediation is not appropriate in all cases.¹⁸⁴ However, it noted that the plaintiff failed to avail itself of the available mechanism for being excused from court-ordered or otherwise mandatory

176. *Id.* at 506.

177. *Id.* at 505-06.

178. *Id.* at 506.

179. *Id.*

180. 833 N.E.2d 489 (Ind. Ct. App. 2005).

181. *Id.* at 496; see Marion County Local Rule 16.3(c)(1) (mandating mediation for parties in civil cases who have "made a timely demand for jury trial").

182. *Id.* at 494-95.

183. *Id.* at 497 (May, J., dissenting).

184. *Id.* at 495 (majority opinion).

mediation contained in the Alternative Dispute Resolution rules.¹⁸⁵

In *Rueth Development Co. v. Muenich*,¹⁸⁶ the court of appeals reversed the trial court's dismissal of an amended complaint for failure to comply with a court-ordered deadline.¹⁸⁷ Specifically, the trial court had ordered the plaintiffs to amend their complaint within twenty days after its order granting the defendant's motion for a more definite statement.¹⁸⁸ Because of a calendaring error by the plaintiffs' attorney, the amended complaint was filed either one or three days late, depending on whether Rule 6(E) applied to extend the deadline.¹⁸⁹

The court in *Rueth* found that the various factors courts balance to determine whether a trial court has abused its discretion in dismissing a case under Rule 41(E) for failure to prosecute are also applicable to "failure to comply with the trial rule" cases under Rule 41(E).¹⁹⁰ Applying the factors, the court found that dismissal was inappropriate.¹⁹¹ The court reasoned that the delay in filing was minimal, the "missed deadline resulted from a calendaring error, not from an intentional violation of the trial court's order," and "[l]ess drastic sanctions were available . . . , such as a verbal warning."¹⁹² Finally, the court noted its preference for "deciding cases on their merits."¹⁹³ The court of appeals found that the trial court abused its discretion in dismissing the plaintiff's complaint.¹⁹⁴

185. *Id.*

186. 816 N.E.2d 880 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 742 (Ind. 2005).

187. *Id.* at 882.

188. *Id.*

189. *Id.* at 882-83; *see also id.* at 883 n.2 (evaluating issue of proper application of IND. TRIAL R. 6(E), but refraining from deciding whether it applied because it was not determinative in this case and had not been argued to the trial court).

190. *Id.* at 884. The factors balanced by the court in evaluating a Rule 41(E) dismissal include (1) the length of the delay; (2) the reason for the delay; (3) the degree of personal responsibility on the part of the plaintiff; (4) the degree to which the plaintiff will be charged for the acts of his attorney; (5) the amount of prejudice to the defendant caused by the delay; (6) the presence or absence of a lengthy history of having deliberately proceeded in a dilatory fashion; (7) the existence and effectiveness of sanctions less drastic than dismissal which fulfill the purposes of the rules and the desire to avoid court congestion; (8) the desirability of deciding the case on the merits; and (9) the extent to which the plaintiff has been stirred into action by a threat of dismissal as opposed to diligence on the plaintiff's part.

Id. (citing *Belcaster v. Miller*, 785 N.E.2d 1164, 1167 (Ind. Ct. App. 2003)). "The weight any particular factor has in a particular case appears to depend upon the facts of that case." *Id.* (internal quotation marks omitted) (quoting *Belcaster*, 785 N.E.2d at 1167).

191. *Id.* at 887.

192. *Id.* at 884-85.

193. *Id.* at 885.

194. *Id.* at 887.

H. Discovery—Request for Admissions

In *Fairland Recreational Club, Inc. v. Indianapolis Downs, LLC*,¹⁹⁵ the court of appeals affirmed the trial court's denial of sanctions for failure to admit a request for admissions where the request was "inartfully written."¹⁹⁶ The plaintiff in *Indianapolis Downs*, a landowner, brought an action against a nearby property owner, alleging that during construction on its property, the nearby property owner diverted underground water away from the landowner's property, draining a lake on the property.¹⁹⁷ During discovery, the landowner served requests for admissions on the defendant property owner, including a request which stated that the "de-watering activities" of the defendant "caused a decline in the water level of the lake."¹⁹⁸ The defendant responded that it was "without sufficient information to either admit or deny" the request.¹⁹⁹ Following a jury trial, the plaintiff was awarded compensatory and punitive damages.²⁰⁰ The plaintiff then filed a request for costs and attorney fees relating to the defendant's denial of the request for admission.²⁰¹

In affirming the trial court's denial of the landowner's request for fees and costs, the court in *Indianapolis Downs* agreed with the defendant that the request was "improperly vague and ambiguous, and unfairly increased the burden on the answering party."²⁰² The court explained that "[b]ecause the purpose of requests for admission is to conclusively establish facts, the requesting party bears the burden of artfully drafting a statement of facts contained in a request for admission in a manner that is precise, unambiguous, and not misleading to the answering party."²⁰³

In dicta, the court in *Indianapolis Downs* expressed disapproval with the

195. 818 N.E.2d 100 (Ind. Ct. App. 2004).

196. *Id.* at 103-04.

197. *Id.* at 101.

198. *Id.* The request at issue provided as follows:

REQUEST NO. 7: Admit or deny that from March 2002 through the present, Indianapolis Downs, its agents, employees, or contractors working for it or under its direction and control, in the course of de-watering activities associated with the construction work on the site, have caused a decline in the water level of the lake located on the property owned and operated by the Fairland Recreation Club.

Id.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 102. The defendant argued that (1) the specific dates in the request on which the water level declined were at issue during trial, (2) the language of the request "required it to admit facts giving rise to a legal theory of liability under respondeat superior[.]" (3) it did not know who owned the property, and (4) the determination of whether its de-watering "caused a decline in the water level . . . was a materially disputed issue of fact that required the expertise of a hydrologist and/or engineer." *Id.* at 102-03.

203. *Id.* at 103 (citing *Weldy v. Kline*, 652 N.E.2d 107, 110 (Ind. Ct. App. 1995)).

manner in which the defendant answered the request for admission.²⁰⁴ Specifically, the court noted that the defendant “neither attempted to object to the request . . . nor indicated that it had conducted a reasonable inquiry to obtain information or that doing so would be unreasonably burdensome[,]” as required by Rule 36(A).²⁰⁵ The court stated that the defendant “could have, and should have, put forth a greater effort to answer the request with whatever clarification was necessary to answer accurately.”²⁰⁶ The court “warn[ed] counsel in future litigation to be more careful in complying not only with the black letter of this rule, but also the spirit of it.”²⁰⁷ Nevertheless, the court in *Indianapolis Downs* found that “[a]lthough Trial Rule 36 provides a procedure for clarifying and objecting to requests for admission that should have been followed, [the defendant] should not be sanctioned for failing to admit [the landowner’s] request.”²⁰⁸

I. Consolidation of Actions

In *Bodem v. Bancroft*,²⁰⁹ the court distinguished the “common question of law or fact” standard for granting a consolidation of proceedings under Indiana Trial Rule 42, from the more stringent “same transaction or occurrence” standard for permissive joinder under Rule 20.²¹⁰ In *Bodem*, an injured plaintiff sought consolidation of two actions she had filed against two separate defendants, relating to two separate rear-end collisions. The plaintiff sought consolidation of the two actions, arguing that if the two trials proceeded separately she would not “get a fair determination of what her damages are, and who in fact caused them” because each defendant could point the finger at the non-party.²¹¹ The trial court granted consolidation and one of the defendants appealed.²¹²

Rule 42, governing consolidation of proceedings, provides as follows:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.²¹³

The defendant in *Bancroft* argued that consolidation of the two actions was improper because the two defendants were “neither required nor permitted to be

204. *Id.*

205. *Id.*; see IND. TRIAL R. 36(A).

206. *Id.*

207. *Id.*

208. *Id.* at 103 n.3.

209. 825 N.E.2d 380 (Ind. Ct. App. 2005).

210. *Id.* at 383.

211. *Id.* at 382.

212. *Id.* at 381.

213. IND. TRIAL R. 42; *Bodem*, 825 N.E.2d at 383.

joined under the rules and case law governing joinder.”²¹⁴ In rejecting the defendant’s argument, the court explained the difference between the standard under Rule 42 and that under Rule 20, which governs permissive joinder:

For consolidation to be proper, it is only necessary that the actions involve a common question of law or fact. Trial Rule 42 does not contain the “same transaction or occurrence” requirement as is found in the rule governing joinder. We cannot deny that if presented with an issue under [Rule 20], we would conclude . . . that joinder of [the two defendants] in the same action would have been improper as there is no logical relationship between the two accidents, except for injury to the same plaintiff. Nevertheless, here, we must only review the trial court’s determination that there is a common issue of law and fact sufficient to justify consolidation.²¹⁵

The court found that the “commonality and overlap in alleged injuries presents a common question of fact sufficient to justify consolidation.”²¹⁶ Therefore, the court of appeals affirmed the ruling by the trial court, consolidating the two actions.²¹⁷

J. Settlement—Fraudulent Inducement to Settle Lawsuit

In *Siegel v. Williams*,²¹⁸ which involved a legal malpractice action, the court of appeals affirmed the trial court’s finding that the attorney-defendant—who was also counsel of record on his own behalf—fraudulently induced a settlement of the malpractice lawsuit by falsely representing to the plaintiff that he lacked assets to pay any judgment in excess of \$25,000 and that if any judgment was entered in excess of that amount, he would file bankruptcy.²¹⁹ The underlying malpractice case had settled, an agreed judgment was filed with the trial court, and, ultimately, a satisfaction and release of judgment was filed court.²²⁰

Approximately two years later, counsel for the plaintiffs in the malpractice action encountered the defendant outside the Marion County court building. The defendant told counsel for the plaintiffs that he “‘pulled one over on [the plaintiffs,]’ because he could have paid a judgment of ‘three hundred, four hundred, five hundred thousand dollars, and [he] got out of it for twenty-five.’”²²¹

214. *Bodem*, 825 N.E.2d at 383.

215. *Id.* at 383-84.

216. *Id.* at 382.

217. *Id.* at 382-83.

218. 818 N.E.2d 510 (Ind. Ct. App. 2004).

219. *Id.* at 512-13. After analyzing the elements of both fraud and constructive fraud, the court ruled that “because [defendant] was an attorney of record, [plaintiffs’] attorneys had ‘a right to rely upon any material misrepresentations that may have been made by opposing counsel . . . as a matter of law.’” *Id.* at 516 (quoting *Fire Ins. Exch. v. Bell*, 643 N.E.2d 310, 313 (Ind. 1994)).

220. *Id.* at 513.

221. *Id.*

The plaintiffs in the malpractice case proceeded to file a second complaint against the attorney-defendant, "alleging fraud and misrepresentation which induced [them] to settle the attorney malpractice claim."²²² The attorney-defendant filed a motion to dismiss for lack of jurisdiction, arguing that "the complaint was actually a Trial Rule 60 motion to set aside the prior judgment."²²³

In rejecting the defendant's argument that the plaintiffs' complaint alleging fraud and misrepresentation was an impermissible collateral attack on the "judgment" resulting from the settlement, the appellate court in *Siegel* found that "agreed judgments do 'not represent the judgment of the court. The court merely performs the ministerial duty of recording the agreement of the parties.'"²²⁴ Therefore, the court held, Trial Rule 60(B)—dictating the grounds for setting aside a judgment—"is inapplicable to the modification of a pre-existing agreed judgment agreed to by the parties to that judgment."²²⁵

The court in *Siegel* viewed the second complaint as a separate action for fraud in the inducement rather than an attack on the prior judgment.²²⁶ The court explained that a party bringing an action for fraud in the inducement of a settlement agreement, including a settlement resulting in an agreed judgment, has an election of remedies: "[H]e may stand upon the contract and seek damages, or rescind the contract, return any benefits he may have received, and seek a return to the status quo ante."²²⁷ Therefore, the court of appeals held that the trial court properly denied the attorney-defendant's motion to dismiss for lack of subject matter jurisdiction.²²⁸

The trial court had found that the plaintiffs' claim would have been worth between \$100,000 and \$150,000, entered judgment against the defendant for \$100,000, and reduced the award by \$30,000 to account for the prior settlement.²²⁹ The court of appeals affirmed the trial court's rulings and damages calculation.²³⁰

222. *Id.*

223. *Id.*

224. *Id.* at 514 (quoting *State ex rel. Prosser v. Ind. Waste Sys., Inc.*, 603 N.E.2d 181, 186 (Ind. Ct. App. 1982)).

225. *Id.* (internal quotation marks omitted) (quoting *Prosser*, 603 N.E.2d at 186).

226. *Id.*

227. *Id.* (internal quotation marks omitted) (quoting *A.G. Edwards and Sons, Inc. v. Hilligoss*, 597 N.E.2d 1, 3 (Ind. Ct. App. 1991)); *see also* *Auto. Underwriters, Inc. v. Rich*, 53 N.E.2d 775, 777 (Ind. 1944) ("He can keep what he has received and file suit against the ones perpetrating the fraud and recover such amounts as will make the settlement an honest one.").

228. *Siegel*, 818 N.E.2d at 515. The court of appeals also affirmed the trial court's finding of fraud and damages calculation. *Id.* at 517.

229. *Id.* at 513.

230. *Id.* at 517.

K. Scope of Arbitration Provision

In *Blimpie International, Inc. v. Choi*,²³¹ a franchisee sued the franchisor, alleging common law fraud and violation of state franchise statutes.²³² The franchisor moved to dismiss or stay proceedings pending arbitration of the claims, pursuant to an arbitration provision contained in the parties' franchise agreement. The provision provided for mandatory arbitration of "any dispute or agreement between [the parties] with respect to any issue arising out of or relating to this Agreement, its breach, its interpretation or any disagreement between [the parties]."²³³ Further, an addendum to the franchise agreement provided that "[t]he waiver of a right to a jury trial will not apply to claims under the Indiana Deceptive Franchise Practices Act or the Indiana Franchise Disclosure Law."²³⁴

The appellate court reversed the trial court's denial of the franchisor's motion, holding that the addendum provision regarding the right to jury trial did not remove the claims relating to the franchise statutes from the scope of the arbitration provision.²³⁵ The court discussed the decision of the Indiana Supreme Court in *ISP.com LLC v. Theising*,²³⁶ which recognized that "the mere existence of a provision addressing procedures outside arbitration does not necessarily demonstrate an 'affirmative intention . . . to undo the arbitration covenant[.]'"²³⁷

As explained by the court in *Theising*:

It is not uncommon to find both arbitration and forum selection clauses in agreements. Several considerations may lead to the inclusion of both. First, and obviously, arbitration may be waived by the parties. If they choose, they may prefer to litigate, but be required to do so in a designated forum.²³⁸

The court in *Blimpie* concluded that "reference to the waiver of jury trial right [did not] demonstrate[] the parties' intent that actions brought under the [franchise statutes] would not be arbitrated."²³⁹ The court explained that "like the parties in [*Theising*], the parties to the agreement before us are presumably free to waive arbitration; should they choose to litigate, they could agree that jury trial would be available."²⁴⁰

231. 822 N.E.2d 1091 (Ind. Ct. App. 2005).

232. *Id.* at 1093.

233. *Id.* at 1094.

234. *Id.* at 1095.

235. *Id.* at 1096.

236. 805 N.E.2d 767 (Ind.), *reh'g denied* (Ind. 2004).

237. *Blimpie*, 822 N.E.2d at 1095 (alteration in original) (quoting *Theising*, 805 N.E.2d at 776).

238. *Id.* at 1095-96 (quoting *Theising*, 805 N.E.2d at 776-77).

239. *Id.* at 1096.

240. *Id.* The court in *Blimpie* also analyzed previous versions of the franchise agreement and, in particular, a general waiver of jury trial provision contained in a prior version that cross-

L. Attorney Fees

1. *Contractual Attorney Fees Provision.*—Indiana generally follows the “American rule” regarding payment of attorney fees, which dictates that “each party [to a lawsuit] is ordinarily responsible for paying his or her own legal fees in the absence of a fee-shifting statutory or contractual provision.”²⁴¹ Where an award of attorney fees “is premised on a contractual provision, the agreement will be enforceable only in accordance with its terms and only if it does not violate public policy.”²⁴²

In *H&G Ortho, Inc. v. Neodontics International, Inc.* (“*H&G Ortho II*”), the court of appeals affirmed the trial court’s enforcement and application of a contractual attorney fee provision and refused to apply the doctrine of “proportionate reduction” to reduce the amount awarded.²⁴³ Specifically, the trial court had awarded \$572,689.73 in attorney fees to the plaintiff, the buyer of an orthodontic supply business, which had obtained a judgment against the seller of the business relating to an alleged breach of a covenant not to compete.²⁴⁴

The court in *H&G Ortho II* rejected the defendant’s argument that the fee should be reduced because the plaintiff was not successful on every issue presented in the litigation.²⁴⁵ In so ruling, the court distinguished *Olcott International & Co. v. Micro Data Base Systems, Inc.*,²⁴⁶ in which the court of appeals found that “where the plaintiff achieved only limited success, the district court should award only the amount of fees that is reasonable in relation to the results obtained.”²⁴⁷ The court in *H&G Ortho II* explained that—unlike the circumstances in *Olcott*—the underlying judgment had not been reduced, the trial

referenced the jury trial addendum at issue in the case. *Id.* The court found that this “extrinsic evidence” resolved any ambiguity in the franchise agreement and that reading the addendum as a modification of the general jury trial waiver “attributes meaning to every portion of the franchise agreement.” *Id.*

241. *H&G Ortho, Inc. v. Neodontics Int’l, Inc. (H&G Ortho II)*, 823 N.E.2d 734, 737 (Ind. Ct. App. 2005) (citing *Barrington Mgmt. Co. v. Paul E. Draper Family Ltd. P’ship*, 695 N.E.2d 135, 142 (Ind. Ct. App. 1998)).

242. *Id.* (citing *Steiner v. Bank One Ind., N.A.*, 805 N.E.2d 421, 428 (Ind. Ct. App. 2004)).

243. *Id.* at 738-39.

244. *Id.* at 736. In *H&G Ortho, Inc. v. Neodontics International, Inc. (H&G Ortho I)*, 823 N.E.2d 718 (Ind. Ct. App. 2005), the court resolved the propriety of the trial court’s award of damages for breach of contract and the issuance of an injunction regarding the alleged breach of the covenant not to compete. *Id.* at 733-34.

245. *Id.* at 738.

246. 793 N.E.2d 1063 (Ind. Ct. App. 2003).

247. *Id.* at 1080 (internal quotation marks omitted) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983)); *H&G Ortho II*, 823 N.E.2d at 738. In *Olcott*, an original judgment in the amount of \$438,850 was reduced to approximately \$5450. *Olcott*, 793 N.E.2d at 1079. Because the amount had been so substantially reduced, the court remanded the case to the trial court for reconsideration of the attorney fee award. *Id.*

court decided nine of eleven issues at either summary judgment or trial in favor of the plaintiff, over ninety percent of the motions filed by the plaintiff were granted, and the plaintiff was successful defeating every aspect of the defendant's summary judgment motions.²⁴⁸ Therefore, the court found "the concept of 'proportionate reduction' inapplicable in these circumstances."²⁴⁹

2. *Frivolous Litigation*.—In *Stoller v. Totton*,²⁵⁰ the court of appeals affirmed the trial court's award of attorney fees in favor of the plaintiff, an injured motorist who had brought a negligence action against a truck driver, alleging damages resulting from a collision of their vehicles.²⁵¹ Specifically, the court in *Stoller* affirmed the trial court's ruling that the defendant truck driver's "affirmative defense [of comparative fault] was frivolous, unreasonable, and groundless," so costs were properly assessed against him.²⁵²

The court stated that "[i]n any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if the court finds that either party . . . brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless."²⁵³ Further, the court defined the statutory terms as follows:

A defense is "frivolous" (a) if it is made primarily to harass or maliciously injure another, (b) if counsel is unable to make a good faith and rational argument on the merits of the action, or (c) if counsel is unable to support the action by a good faith and rational argument for extension, modification, or reversal of existing law. A defense is "unreasonable" if, based upon the totality of circumstances, including the law and facts known at the time, no reasonable attorney would consider the defense justified or worthy of litigation. A defense is "groundless" if no facts exist which support the defense relied upon and supported by the losing party.²⁵⁴

In affirming the trial court's award of approximately \$8800 in fees and expenses, the court in *Stoller* explained that "not only did [the defendant] have no evidence to support his theory [of comparative fault]," but he actually admitted facts during discovery that refuted the defense.²⁵⁵ Further, the defendant maintained the defense "until after three witnesses testified at trial,

248. *H&G Ortho II*, 823 N.E.2d at 738.

249. *Id.* The court in *H&G Ortho II* proceeded to examine the "reasonableness" of the attorney fees awarded by the trial court. *Id.* at 738-39. After evaluating the testimony of experts presented by both sides, the court concluded that "[t]he evidence presented at the hearing justified the amount of the award as well as its reasonableness." *Id.* at 739.

250. 833 N.E.2d 53 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 189 (Ind. 2005).

251. *Id.* at 54.

252. *Id.* at 56.

253. *Id.* at 55 (quoting IND. CODE § 34-52-1-1 (2005)).

254. *Id.* (quoting *Grubnich v. Renner*, 746 N.E.2d 111, 119 (Ind. Ct. App. 2001) (internal citations and quotations omitted)).

255. *Id.* at 56.

despite repeated attempts on [the plaintiff's] part to settle the issue of liability."²⁵⁶

In *Northern Electric Co. v. Torma*,²⁵⁷ the court cited the Indiana Supreme Court's approval of the above definition of the relevant statutory terms and added that "a claim or defense is neither groundless nor frivolous merely because a party loses on the merits."²⁵⁸ The court in *Torma* recognized that the frivolous litigation statute "strikes a balance between respect for an attorney's duty of zealous advocacy and 'the important policy of discouraging unnecessary and unwarranted litigation.'"²⁵⁹ The court explained that "the legal process must invite, not inhibit the presentation of new and creative arguments to enable the law to grow and evolve."²⁶⁰ As such, the court continued, "application of the statutory authorization for recovery of attorneys' fees . . . must leave breathing room for zealous advocacy and access to courts to vindicate rights."²⁶¹

The court in *Torma* reversed the trial court's award of attorney fees in favor of the defendant, a former employee who was accused of misappropriating his former employer's trade secrets.²⁶² The court found that "the most [the plaintiff] can be accused of here is zealous advocacy."²⁶³ The court explained the following:

Our review of the trial court's proceedings and the party's briefs reveal a well-argued and supported arguments on the merits. Even though some issues are new to this jurisdiction, this alone should not preclude a party's unbridled access to the courts and expose it to sanctions; instead, it should be lauded by the courts as a way for Indiana's case law to evolve.²⁶⁴

The court reversed both the trial court's conclusions on the merits of the case and its award of attorney fees, stating that "considering the totality of the circumstances, including the law and facts known at the time of filing this action, a reasonable attorney could well have found [the plaintiff's] claim worthy of defending."²⁶⁵

256. *Id.*

257. 819 N.E.2d 417 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 748 (Ind. 2005).

258. *Id.* at 430-431 (citing *Kahn v. Cundiff*, 533 N.E.2d 164, 171 (Ind. Ct. App.), *aff'd*, 543 N.E.2d 627, 629 (Ind. 1989)).

259. *Id.* at 431 (quoting *Mitchell v. Mitchell*, 695 N.E.2d 920, 924 (Ind. 1998)).

260. *Id.*

261. *Id.*

262. *Id.* at 420-21, 432.

263. *Id.* at 432 (citing *Mitchell*, 685 N.E.2d at 924).

264. *Id.*

265. *Id.* (citing IND. CODE § 34-52-1-1 (2004)).

INDIANA CONSTITUTIONAL DEVELOPMENTS: LACHES, SENTENCES, AND PRIVACY

JON LARAMORE*

Indiana's appellate courts addressed important issues arising under the Indiana Constitution during the survey period. The courts addressed several structural provisions of the constitution, including two claims relating to the Special Laws Clauses, claims for modification of criminal sentences, and distribution of powers claims.¹

The courts also addressed important claims regarding individual rights, including a challenge to a statute regulating access to abortion and a claim that Indiana's statute barring same-sex marriage violated the Indiana Constitution.² The Indiana Supreme Court also issued an important decision providing further explanation of the test applicable to claims of unreasonable search, and the Indiana Court of Appeals continued to develop the case law applying Indiana's unique standards for evaluating searches and double jeopardy.³

I. DEVELOPMENTS REGARDING THE STRUCTURAL CONSTITUTION

A. Article IV, Sections 22 and 23

The Indiana Supreme Court applied the special laws provisions⁴ in *State ex rel. Attorney General v. Lake Superior Court*,⁵ another in the line of constitutional cases relating to the 2002 property tax assessment.⁶ A group of Lake County taxpayers challenged the constitutionality of a statute under which their county's property tax assessment took place, alleging that it violated the

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1. See *infra* Part I; see also Jon Laramore, *Indiana Constitutional Developments*, 37 IND. L. REV. 929, 929-30 (2004) (differentiating the structural provisions of the Indiana Constitution (generally articles III through XV) from the rights constitution (generally articles I, II, and XVI)).

2. See *infra* Part II.A-B.

3. See *infra* Part II.C-L; see also Jon Laramore, *Indiana Constitutional Developments*, 38 IND. L. REV. 963, 981-87 (2005) (describing earlier court of appeals cases in the search and double jeopardy areas).

4. IND. CONST. art. IV, §§ 22-33.

5. 820 N.E.2d 1240 (Ind.), *cert. denied*, 126 S. Ct. 398 (2005).

6. State Bd. of Tax Comm'rs v. Town of St. John, 751 N.E.2d 657 (Ind. 2001); State Bd. of Tax Comm'rs v. Town of St. John, 702 N.E.2d 1034 (Ind. 1998); Town of St. John v. State Bd. of Tax Comm'rs, 695 N.E.2d 123 (Ind. 1998); Boehm v. Town of St. John, 675 N.E.2d 318 (Ind. 1996); Town of St. John v. State Bd. of Tax Comm'rs, 729 N.E.2d 242 (Ind. Tax Ct. 2000); Town of St. John v. State Bd. of Tax Comm'rs, 698 N.E.2d 399 (Ind. Tax Ct. 1998); Town of St. John v. State Bd. of Tax Comm'rs, 691 N.E.2d 1387 (Ind. Tax Ct. 1998); Town of St. John v. State Bd. of Tax Comm'rs, 690 N.E.2d 370 (Ind. Tax Ct. 1997); Town of St. John v. State Bd. of Tax Comm'rs, 665 N.E.2d 965 (Ind. Tax Ct. 1996).

special law provisions and other parts of the Indiana Constitution.⁷ The Indiana Supreme Court's decision not only illuminated those two sections but also plowed new ground in other areas of Indiana constitutional doctrine.

The taxpayers challenged a statute that directed the Department of Local Government Finance, a state agency, to contract with a private company to perform the property tax assessment in Lake County.⁸ Normally, property tax assessments are supervised by elected county and township assessors, not by a state agency.⁹ The court surmised that the special treatment accorded Lake County stemmed from its long history of "uneven assessments and generally lower assessed valuations than those in other parts of the state for similar properties."¹⁰ The taxpayers' challenge to this special treatment met success in the trial court, which enjoined the assessment on five separate constitutional grounds.¹¹

The Indiana Supreme Court first ruled that the trial court lacked jurisdiction because the taxpayers had failed to exhaust administrative remedies.¹² The relief the taxpayers sought was a decrease in their assessments, and Indiana's statutes provide a multi-level administrative and judicial process to provide that relief. Under those statutes, administrative remedies must be pursued regardless of the basis of the taxpayer's claim, even when the taxpayer seeks a remedy beyond the administrative agency's competence, such as invalidating a statute.¹³ Because the applicable statutes required that administrative remedies be exhausted and Indiana's courts consider exhaustion be a necessary component of subject matter jurisdiction, the court ruled that the trial court lacked jurisdiction over the taxpayers' claims.¹⁴

The court nevertheless addressed the taxpayers' claims on the merits because resolution of the issue was in the public interest.¹⁵ Hundreds of thousands of property owners had received assessments under the challenged system in Lake County, and the state-directed reassessment had led to substantial changes in

7. *State ex rel. Att'y Gen.*, 820 N.E.2d at 1244.

8. IND. CODE § 6-1.1-4-32 (2004). The author of this Article was Commissioner of the Department of Local Government Finance and its predecessor agency in 2001-2003 and participated in decisions relating to the Lake County reassessment.

9. IND. CODE § 6-1.1-4-13.6 (2002).

10. *State ex rel. Att'y Gen.*, 820 N.E.2d at 1244-45.

11. *Id.* at 1243.

12. *Id.* at 1246-47.

13. *Id.* at 1246 (citing *State Bd. of Tax Comm'rs v. Mixmill Mfg. Co.*, 702 N.E.2d 701 (Ind. 1998); *State v. Sproles*, 672 N.E.2d 1353 (Ind. 1996)).

14. *Id.* at 1246-47.

15. *Id.* at 1247. The Indiana Constitution contains no "case or controversy" requirement. Indiana courts thus have authority to issue advisory opinions (such as the one in this case). The Indiana Supreme Court, however, has directed courts to be abstemious in doing so in order to avoid intruding into the realms of the other branches of government. *See, e.g., Pence v. State*, 652 N.E.2d 486, 488 (Ind. 1995).

some assessments and the resulting tax bills.¹⁶ In particular, the reassessment shifted the tax burden from certain older businesses to homeowners, especially owners of older homes.¹⁷ By addressing the arguments on the merits, the court could potentially forestall widespread public discontent over the reassessment that could simmer for years while individual claims made their way through the administrative adjudication system.

The court next addressed whether the statute violated article IV, section 22, which precludes “local or special laws” in sixteen enumerated categories, including those “providing for the assessment and collection of taxes.”¹⁸ The court concluded that the statute was indeed special.¹⁹ It applied to counties with populations between 400,000 and 700,000 and was in effect for a limited period of time.²⁰ In operation, it could apply only to Lake County.²¹

The court further concluded that the statute violated section 22 on its face because it was a special law “providing for the assessment” of taxes.²² It treated one county differently than every other county in the manner of assessing property.²³ Although every county was required to use the same assessing rules as a matter of substance, the statute nevertheless treated Lake County differently as a matter of assessing procedure because the statute directed Lake County’s assessment to be supervised in a different manner than any other county’s assessment.²⁴ The state argued that the provision would be violated only if the special law related to *both* assessment *and* collection of taxes, but the court rejected that construction as overly literal.²⁵ The court also pointed to statements from the constitutional debates showing the importance the delegates placed on uniform assessment practices.²⁶

Before addressing the proper remedy, the court detoured through a discussion of article IV, section 23.²⁷ This analysis was not necessary to the court’s result

16. *State ex rel. Att’y Gen.*, 820 N.E.2d at 1258 (Rucker, J., concurring in part and dissenting in part) (regarding changes in tax bills); IND. FISCAL POLICY INST., STATEWIDE PROPERTY TAX EQUALIZATION STUDY REPORT 52 (2005) (parcel count), *available at* www.indianafiscal.org/report.pdf [hereinafter STUDY REPORT].

17. STUDY REPORT, *supra* note 17, at Foreword.

18. IND. CONST. art. IV, § 22.

19. *State ex rel. Att’y Gen.*, 820 N.E.2d at 1248-49.

20. *Id.* at 1248.

21. *Id.*

22. *Id.* at 1249.

23. *Id.* The court already had addressed this portion of section 22 in *State v. Hoovler*, 668 N.E.2d 1229 (Ind. 1996), stating that although the “assessment or collection of a tax” language did not apply in *Hoovler* (which addressed a special law governing tax rates, not tax assessments), the language would apply to a different system of attaching assessed values to property, precisely the circumstance of *State ex rel. Attorney General*.

24. *State ex rel. Att’y Gen.*, 820 N.E.2d at 1249.

25. *Id.* at 1248.

26. *Id.* at 1249.

27. *Id.* at 1249-50.

because the court already held that the statute violated section 22; therefore, it could not be saved by section 23, which requires that “where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State.”²⁸ The court concluded that the special law might survive scrutiny under section 23 because Lake County’s history of poor assessments was the worst in the State, perhaps justifying unique treatment.²⁹ The court pointed out that the *Town of St. John* litigation, which led to a revamping of assessment practices statewide, arose from complaints by Lake County residents that their assessments were intolerably disuniform.³⁰ Moreover, the court noted that the state assessment agency had tried to conduct a reassessment of Lake County in 1998 because of the county’s documented poor assessment practices, but the Indiana Tax Court ruled that the state agency lacked authority to hire a contractor to reassess.³¹ Immediately after that decision, the General Assembly enacted the statute at issue in this case, giving the state assessment agency authority to hire a contractor to reassess Lake County.³² Because the case was decided based on section 22, the court did not reach a conclusion regarding the application of section 23, but it strongly implied that the statute would pass muster under that provision because of Lake County’s special circumstances.³³

The court unanimously held that the trial court lacked jurisdiction because the taxpayers failed to exhaust administrative remedies, but it was not unanimous as to any other matters. Chief Justice Shepard and Justice Sullivan concurred only in the portion of the opinion finding no jurisdiction and concluded that the portions of the opinion applying article IV were “unnecessary to the determination of this case.”³⁴ They would have ended the case by instructing the taxpayers to go through the appropriate administrative channels before they could present their constitutional claim to the courts.³⁵

Justice Boehm, who wrote the court’s opinion, joined by Justice Dickson, concluded that a later statute passed by the General Assembly cured the constitutional problem. The later statute, in effect at the time of the court’s decision, gave the state assessment agency authority to take over the assessment in any county that was falling behind or failing to follow proper assessment practices.³⁶ It gave specific authority for the state agency to hire a private

28. IND. CONST. art. IV, § 23.

29. *State ex rel. Att’y Gen.*, 820 N.E.2d at 1249-50.

30. *Id.* at 1250 (citing *Boehm v. Town of St. John*, 675 N.E.2d 318, 324 (Ind. 1996)).

31. *Id.* (citing *Matonovich v. State Bd. of Tax Comm’rs*, 705 N.E.2d 1093, 1098 (Ind. Tax Ct. 1999)).

32. *Id.*

33. *See id.* The court also rejected arguments that the statute violated the Uniformity Clause, article X, section 1 (because that provision does not address the system of assessment) and the Equal Privileges and Immunities Clause, article I, section 23 (because different treatment of Lake County residents was justified by its unique history of poor assessing practices). *Id.* at 1250-51.

34. *Id.* at 1257-58 (Sullivan, J., concurring).

35. *Id.* at 1257.

36. *Id.* at 1252 (plurality opinion) (citing IND. CODE § 6-1.1-4-35 (2004)).

contractor to take over the assessment in any such county, just as the Lake County legislation had permitted.³⁷ These two justices found that the newer statute “acts as curative legislation by authorizing actions taken pursuant to an unconstitutional statute.”³⁸ These justices compared the initial law covering Lake County and the later law extending nearly identical provisions to the other ninety-one counties and concluded that the later law ratified the actions taken under the earlier law and corrected the constitutional problem in the earlier law pertaining only to Lake County.³⁹ But this view did not draw a third vote.

In a separate opinion, Justice Rucker strongly took issue with the notion that the later statute cured the defect in the earlier one.⁴⁰ He noted that the reassessment conducted under the special law “had a devastating impact on the ability of many homeowners to meet their monthly mortgage payment obligations” by raising tax bills by hundreds of percent.⁴¹ He found that nothing in the text of the 2004 legislation indicated that it was intended to cure defects in the Lake County special legislation.⁴² He also found the two statutes sufficiently different in substance that he could not conclude that, taken together, they gave the state assessment agency identical powers in all ninety-two counties.⁴³

Nevertheless, three justices, Boehm, Dickson, and Rucker, concurred in the portion of the court’s opinion entitled “Appropriate Relief,” which stated that injunctive relief against the assessments was not an appropriate remedy “for reasons apart from lack of jurisdiction.”⁴⁴ The opinion pointed out that there was “no basis [in the record] to conclude” that any of the assessments issued in Lake County under the special law were invalid or incorrect or that different assessments would have been placed on the properties by elected assessors.⁴⁵ The court also noted that if it invalidated the assessments in Lake County, the 2004 statute would permit the state assessment agency to step in again, hire a contractor, and redo the assessment independent of locally elected assessors (at additional cost to Lake County).⁴⁶ The court stated that as a matter of equity, an injunction under such circumstances would be futile and contrary to the public interest.⁴⁷

Justices Boehm, Dickson, and Rucker further subscribed to the conclusion

37. *Id.*

38. *Id.*

39. *Id.* at 1254.

40. *Id.* at 1258 (Rucker, J., concurring in part and dissenting in part). Although Justice Rucker attributes the “curative legislation” analysis to “the majority” opinion, only two justices actually subscribed to the analysis. *Id.* at 1259.

41. *Id.* at 1258.

42. *Id.* at 1259.

43. *Id.* at 1260.

44. *Id.* at 1255 (majority opinion).

45. *Id.*

46. *Id.* at 1255-56.

47. *Id.* at 1256.

that laches barred an equitable remedy.⁴⁸ Although the plaintiffs knew about the special law since it was enacted in 2001, they did not go to court until the assessment was completed in 2004.⁴⁹ Had they acted sooner, the General Assembly presumably could have corrected the problem by enacting a valid general law.⁵⁰ The plaintiffs' inexcusable delay therefore precluded them from obtaining relief in the action.⁵¹

In sum, although a majority concluded that the statute violated section 22, the taxpayers obtained no relief because three justices agreed that the claim was barred by laches.⁵² The substantive application of sections 22 and 23 fit the court's established special law jurisprudence, which mandates a three-step inquiry.⁵³ First, a court must determine whether the statute is special as applied, however it may be written to attempt to avoid special-law analysis. Second, if the law is special and fits a section 22 category, it is invalid. Third, if the statute passes muster under section 22, courts examine whether special circumstances in a locale justify special statutory treatment. The Indiana Supreme Court previously applied the third step of this inquiry to invalidate an annexation statute in *Municipal City of South Bend v. Kimsey*,⁵⁴ and *State ex rel. Attorney General* brings symmetry to the jurisprudence by providing an example of a statute invalid under section 22.

In another special law challenge under article IV, the Indiana Supreme Court also invoked laches. In *SMDfund, Inc. v. Fort Wayne-Allen County Airport Authority*,⁵⁵ citizens challenged the statute under which the airport authority was created, arguing that it was an unconstitutional special law.⁵⁶ Although a general law existed allowing counties to create airport authorities, the Fort Wayne-Allen County Authority was created under a special law applying only to counties with a population of 300,000 to 400,000, a category into which only Allen County fit at the time.⁵⁷ Since its creation, the Authority operated airports, spent public funds, and issued debt.⁵⁸ The plaintiffs brought this action challenging the Authority's constitutional legitimacy when it moved to close an airport, an action

48. *Id.*

49. *Id.*

50. *See id.*

51. *Id.*

52. *Id.*

53. The three-step inquiry arises from two different Indiana Supreme Court decisions. The first step may be found in *Indiana Gaming Commission v. Moseley*, 643 N.E.2d 296, 300-01 (Ind. 1994). The second and third steps may be found in *State v. Hoovler*, 668 N.E.2d 1229, 1233 (Ind. 1996).

54. 781 N.E.2d 683 (Ind. 2003).

55. 831 N.E.2d 725 (Ind. 2005), *cert. denied sub nom.* Tocci v. Fort-Wayne-Allen County Airport Auth., 126 S. Ct. 1051, *and reh'g denied*, 126 S. Ct. 1459 (2006).

56. *Id.* at 727-28.

57. *Id.* at 727.

58. *Id.* at 727, 729, 731.

the plaintiffs opposed.⁵⁹

Without analysis of the constitutional question, the court ruled unanimously that the lawsuit seeking the equitable remedy of declaratory relief was barred by laches.⁶⁰ Justice Boehm wrote the opinion. The court found that the elements of laches were met because the plaintiffs' delay was inexcusable, they waived their claim by acquiescing in the Authority's existence, and the Authority had been prejudiced.⁶¹ The Authority had issued debt and acquired property in reliance on the statute.⁶² Moreover, had the lawsuit been brought sooner, the General Assembly could have acted to correct the problem before the Authority took actions in reliance on the statute.⁶³

The plaintiffs argued that they had no reason to sue until the authority chose to close the airport they wanted to remain open.⁶⁴ But they did not sue to stop the closing. Rather, they sued on a claim that had been available to them for almost twenty years—that the authority itself was illegally constituted.⁶⁵ That claim did not depend on the Authority's decision to close the airport.

The court's application of laches to bar special law claims in these two cases may be related to how the court's special law jurisprudence has recently evolved. The court began to outline this doctrine in *Indiana Gaming Commission v. Moseley*,⁶⁶ a 1994 case rejecting special law challenges to the riverboat gaming statute. It continued to evolve the case law in *State v. Hoovler*,⁶⁷ a 1996 case upholding a special law permitting a tax rate increase in Tippecanoe County. In these cases, the court established the three-step framework for special law analysis. But only when the court actually invalidated a statute in *Municipal City of South Bend v. Kimsey*⁶⁸ did plaintiffs and their counsel come out of the woodwork to challenge various statutes as potentially contrary to the Special Law Clauses.

Before modern special law doctrine was put in place, the court allowed statutes creating laws that were special in practice to pass scrutiny under article IV so long as the laws designated locations through population categories, under the ruse that multiple locations could move in and out of the categories and therefore were not special.⁶⁹ In fact, as populations changed, the General Assembly simply changed the population categories so that the same locations

59. *Id.* at 727.

60. *Id.* at 732.

61. *Id.* at 729-31.

62. *Id.* at 731.

63. *Id.*

64. *Id.* at 730.

65. *Id.* at 727-28.

66. 643 N.E.2d 296 (Ind. 1994).

67. 668 N.E.2d 1229 (Ind. 1996).

68. 781 N.E.2d 683 (Ind. 2003).

69. See, e.g., *N. Twp. Advisory Bd. v. Mamala*, 490 N.E.2d 725 (Ind. 1986), *abrogated on other grounds by Kimsey*, 781 N.E.2d 683 (approving as general law statute regulating park in township with population of 180,000 to 204,000 in county with two second-class cities).

remained covered by the same special laws despite changes in population.⁷⁰

In both *SMDfund* and *State ex rel. Attorney General*, the Indiana Supreme Court created a procedural safe harbor for at least some of these older special laws. For laws passed before the current rules were entirely clear, laches can be asserted to bar claims under sections 22 and 23 when there has been significant reliance on the special laws—in *SMDfund*, issuance of debt, and in *State ex rel. Attorney General*, expenditure of tens of millions of dollars for an assessment that appeared to be an improvement over past practices. Applying laches in this context appears to be a fair way to balance the reliance on statutes enacted under then-prevailing precedents against the inaction of plaintiffs who allow inordinate time to pass before raising their claims. The court is likely to give teeth to its recent special law precedents by continuing to apply them to more recently enacted statutes and in situations where there has not been significant reliance on the unconstitutional special law.

B. Distribution of Powers

In *Pinkston v. State*,⁷¹ the Indiana Court of Appeals used the distribution of powers concepts in article III to analyze a creative trial court stratagem to cope with changing sentencing rules. When the U.S. Supreme Court decided *Blakely v. Washington*,⁷² it became clear that portions of Indiana's criminal sentencing system did not comply with the Sixth Amendment.⁷³ *Blakely* held that, in a system like Indiana's where presumptive sentences could be increased based on specific factual findings, the Sixth Amendment required those factual findings to be made by juries (with certain enumerated exceptions).⁷⁴ Indiana made no provision for a jury determination of aggravating factors for sentencing; rather, Indiana left that question to judges alone, contrary to *Blakely*'s construction of the Sixth Amendment.⁷⁵

A Marion County Superior Court judge addressed this problem in a case

70. See, e.g., 1992 Ind. Legis. Serv. page no. 12-1992 (West) (changing population categories in dozens of statutes).

71. 836 N.E.2d 453 (Ind. Ct. App. 2005), *trans. denied* (Ind. 2006). Judge Friedlander dissented on a specific sentencing issue also addressed by the opinion, but he agreed that "there was no error in conducting a hearing for the purpose of asking the jury to determine the existence of aggravating circumstances, for sentencing purposes." *Id.* at 466.

72. 542 U.S. 296 (2004). The Indiana Supreme Court applied *Blakely* to Indiana's system in *Smylie v. State*, 823 N.E.2d 679, 681-82 (Ind.), *cert. denied*, 126 S. Ct. 545 (2005).

73. *Pinkston*, 836 N.E.2d at 458.

74. *Id.* (citing *Blakely*, 542 U.S. 296).

75. The General Assembly amended Indiana's sentencing statutes to address *Blakely* by passing Public Law 71-2005. P.L. 71-2005, 114th Gen. Assemb., 1st Reg. Sess. (Ind. 2005). This amendment abolished "presumptive" sentences and the requirement for specific factual findings to impose sentences greater than presumptive. The amendment allows judges to use their discretion to impose sentences within a range, a practice that does not violate *Blakely*'s construction of the Sixth Amendment. See, e.g., IND. CODE § 35-50-2-4 (outlining sentences for Class A felonies).

decided shortly after *Blakely* by empanelling a jury to address sentencing aggravators after conviction.⁷⁶ The jury determined that the “State proved both of the charged aggravators beyond a reasonable doubt,” and the trial court imposed a greater-than-presumptive sentence based on those findings.⁷⁷ Pinkston challenged his enhanced sentence, arguing that article III mandated that only the General Assembly, not individual courts, could prescribe the methods to be used to sentence criminal defendants.

The Indiana Court of Appeals disagreed.⁷⁸ First, the court stated that the Indiana Supreme Court explicitly authorized the use of a jury to determine whether the State proved aggravating factors beyond a reasonable doubt in one of its cases analyzing *Blakely*.⁷⁹ Second, the court “fail[ed] to see how the addition of an aggravator phase to a defendant’s trial usurps an official duty assigned to the legislature.”⁸⁰ No statute precluded such an additional hearing, and “trial courts have the inherent authority to control the conduct of trials.”⁸¹ Moreover, the legislature’s assignment to trial courts of the sentencing duty also delegates the authority to use necessary procedures to determine what those sentences should be.⁸² The court of appeals found that the sentencing procedure did not violate article III.⁸³

The Indiana Constitution’s provision giving the Indiana Supreme Court exclusive jurisdiction over lawyer discipline was used as a defense in litigation to collect legal fees in *Alvarado v. Nagy*.⁸⁴ The plaintiff claimed punitive damages, and the attorney moved to dismiss on the theory that punitive damages constituted lawyer discipline, the responsibility for which is exclusively the supreme court’s under article VII, section 4.⁸⁵ The court of appeals disagreed with the constitutional claim, reasoning that the plaintiff actually was alleging legal malpractice.⁸⁶ It concluded that punitive damages are an available remedy for malpractice (and not a remedy for professional misconduct that may be meted out by the supreme court) so that the relief the plaintiff sought was not equivalent to attorney discipline.⁸⁷

76. *Pinkston*, 836 N.E.2d at 455-56.

77. *Id.* at 456.

78. *Id.* at 457. The State also argued that Pinkston waived his argument based on article III because he failed to raise it in the trial court. *Id.* The Indiana Court of Appeals nevertheless addressed the argument on the merits. *Id.*

79. *Id.* at 457-58 (citing *Smylie v. State*, 823 N.E.2d 679, 685 (Ind.), *cert. denied*, 126 S. Ct. 545 (2005)).

80. *Id.* at 458.

81. *Id.* (internal quotation marks omitted) (quoting *Fugett v. State*, 812 N.E.2d 846, 850 (Ind. Ct. App. 2004)).

82. *Id.*

83. *Id.*

84. 819 N.E.2d 520 (Ind. Ct. App. 2004).

85. *Id.* at 522.

86. *Id.* at 525.

87. *Id.*

C. Sentence Modifications

The Indiana Supreme Court used its constitutional authority to modify criminal sentences several times during the survey period, although the Indiana Court of Appeals used its authority to do so more sparingly. The current court rule guiding appellate courts' discretion in sentence revision allows modification "if, after due consideration of the trial court's decision, the court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."⁸⁸

In *Frye v. State*,⁸⁹ the Indiana Supreme Court examined a forty-year total sentence for burglary, theft, and false informing. The trial court cited Frye's "extensive criminal history and questionable character" in assigning this above-presumptive sentence.⁹⁰ The supreme court noted that the offense was non-violent and committed when the victim was away from her home, lessening the possibility of confrontation.⁹¹ Little of value was taken, and most items were returned to the victim.⁹² Although Frye had a number of past sentences, most were alcohol-related, and his last violent offense was more than five years earlier.⁹³ The court stated that "we cannot conclude that those transgressions even when aggregated demonstrate a character of such recalcitrance or depravity to justify a sentence of 40 years."⁹⁴ By a 4-1 vote, the court reduced the sentence from forty to twenty-five years.⁹⁵ Justice Dickson dissented, emphasizing the facts of the crimes and concluding that the "due consideration of the trial court's decision"⁹⁶ mandated by the applicable appellate rule required that the sentence be undisturbed as "quite commensurate with the offense and the offender."⁹⁷

The court's analysis was more extensive in *Cotto v. State*,⁹⁸ in which the defendant was sentenced to fifty years for possessing methamphetamine. Indiana's sentencing system required trial judges to identify aggravating and mitigating circumstances and increase or decrease the presumptive sentence based on those factors.⁹⁹ In Cotto's case, the trial court found five aggravators

88. IND. APP. R. 7(B).

89. 837 N.E.2d 1012 (Ind. 2005), *reh'g denied* (Ind. 2006).

90. *Id.* at 1013 (citing *Frye v. State*, 822 N.E.2d 661 (Ind. Ct. App.), *aff'd in part, vacated in part*, 837 N.E.2d 1012 (Ind. 2005)).

91. *Id.* at 1014.

92. *Id.*

93. *Id.* at 1014.

94. *Id.* at 1015.

95. *Id.*

96. *Id.* at 1016 (Dickson, J., dissenting) (quoting IND. APP. R. 7(b)).

97. *Id.*

98. 829 N.E.2d 520, 522 (Ind. 2005).

99. *Id.* at 524; *see, e.g.*, IND. CODE § 35-50-2-4 (2004). Indiana's sentencing statutes were amended to eliminate the requirement that judges use specific aggravators and mitigators to justify departure from the presumptive sentence by P.L. 71-2005.

including his “criminal history, his likelihood of reoffending,” the likelihood he was “involved in a substantial drug operation,” his need for rehabilitation provided in a penal facility, and that reducing the sentence would “depreciate the seriousness of the crime.”¹⁰⁰ The trial court found no mitigating circumstances.¹⁰¹ On appeal, the State conceded that the last two aggravating factors listed in the previous sentence were used improperly by the trial court, leaving three aggravating circumstances.¹⁰²

The Indiana Supreme Court analyzed the aggravators and mitigators it believed to be present. Although the trial court found no mitigators, the court found that Cotto’s guilty plea was entitled to mitigating weight.¹⁰³ It showed that he accepted responsibility for the crime, and the court concluded that Cotto received no other bargained-for benefit from his plea (in contrast to cases in which the plea is traded for reducing or dismissing charges).¹⁰⁴ The court also believed that Cotto showed remorse by apologizing for his crime and acknowledging his drug addiction.¹⁰⁵ The court also gave less weight to the aggravating factors, finding that Cotto’s criminal history consisted of only “five alcohol-related misdemeanors” that were “only marginally significant” in relation to sentencing for a Class A felony.¹⁰⁶ The court then rebalanced the aggravating and mitigating factors and, by a 3-2 vote, reduced the sentence from fifty years to the presumptive thirty-year term.¹⁰⁷ Justice Dickson, joined by Justice Boehm, dissented on the basis that “the trial court was in the best position to determine whether mitigating consideration should be given to Cotto’s eventual guilty plea . . . and to his claim of remorse.”¹⁰⁸

The Indiana Supreme Court went through similar analyses in other cases. In *Estes v. State*,¹⁰⁹ the court unanimously revised a 267-year sentence for child molesting to 120 years because the sentence was “outside the typical range” for similar crimes.¹¹⁰ “Estes had no criminal history, and he expressed remorse.”¹¹¹ In *Francis v. State*,¹¹² the court reduced a fifty-year child molesting sentence to the presumptive sentence of thirty years, again finding that the trial court should have given mitigating weight to Francis’s guilty plea and apology and finding that his criminal history was minimal.¹¹³ The Indiana Supreme Court found that

100. *Cotto*, 829 N.E.2d at 524.

101. *Id.*

102. *Id.*

103. *Id.* at 525.

104. *Id.*

105. *Id.* at 526.

106. *Id.*

107. *Id.* at 527.

108. *Id.* (Dickson, J., dissenting).

109. 827 N.E.2d 27 (Ind. 2005).

110. *Id.* at 29.

111. *Id.*

112. 817 N.E.2d 235 (Ind. 2004).

113. *Id.* at 237-39.

the trial court erred in determining that the victim's age, under twelve, supported the enhanced sentence because the victim's age was an element of the offense.¹¹⁴ Even though the victim's age was "taken into account to some extent by the fact that the offense [was] a Class A felony," the fact that the victim was only six was still entitled to low to medium weight as an aggravating circumstance.¹¹⁵ Justice Dickson dissented without opinion.

In *Ruiz v. State*,¹¹⁶ the supreme court unanimously reduced the maximum twenty-year sentence for child molesting to the ten-year presumptive sentence.¹¹⁷ The court found that Ruiz had minimal criminal history (the only aggravating factor cited by the trial court) and that his guilty plea and apology should be weighed as mitigators.¹¹⁸ In *Neale v. State*,¹¹⁹ the defendant received the fifty-year maximum sentence for child molesting. The Indiana Supreme Court looked at the three aggravating and four mitigating factors the trial court found, depreciated the weight of the defendant's all-misdemeanor criminal history, and rebalanced the factors to cut the term to forty years, plus ten years of probation.¹²⁰ The court stated: "When we made the change to the language of [Appellate Rule 7], we changed its thrust from a prohibition on revising sentences unless certain narrow conditions were met to an authorization to revise sentences when certain broad conditions are satisfied."¹²¹

The Indiana Supreme Court's activism in sentence revision during the survey period, along with the recent relaxation of the appellate rule that permitted such revisions, may indicate increased interest by the supreme court in setting more uniform sentencing standards for application by the trial courts. It remains to be seen whether the court of appeals will abandon its longstanding reluctance to second-guess trial court sentences to join the supreme court's potential trend.

II. THE RIGHTS CONSTITUTION

Indiana's appellate courts issued many decisions applying the protections of the Bill of Rights in the Indiana Constitution during the survey period. These addressed new issues, including a potential right to privacy under article I, section 1, and new claims under the Equal Privileges and Immunities Clause of section 23. The Indiana Court of Appeals also continued its recent trend by continuing to develop caselaw applying the unique provisions of article I, section 11, governing searches and article I, section 14, governing double jeopardy, and

114. *Id.* at 238.

115. *Id.*

116. 818 N.E.2d 927 (Ind. 2004).

117. *Id.* at 928.

118. *Id.* at 928-29.

119. 826 N.E.2d 635 (Ind. 2005).

120. *Id.* at 638-39. Justice Dickson dissented because he believed that the trial court's decision was entitled to greater deference under Appellate Rule 7(B). *Id.* at 639 (Dickson, J., dissenting).

121. *Id.* at 639.

other provisions of the Bill of Rights.

A. Privacy Under Article I, Section 1

In *Clinic for Women, Inc. v. Brizzi*,¹²² the Indiana Supreme Court developed Indiana constitutional law in two ways: it took an additional step to elucidate a possible right to privacy, and it clarified the general analytical framework for looking at individual rights. Justice Rucker wrote the majority opinion, joined by Chief Justice Shepard and Justice Sullivan.

The court analyzed Indiana Code section 16-34-2-1.1, the abortion waiting period statute.¹²³ The statute requires that, at least eighteen hours before an abortion is performed, the physician performing the abortion or another qualified health care professional must “orally” and “in the presence of the pregnant woman” provide specified information to the woman.¹²⁴ The mandatory information includes “[t]he name of the physician performing the abortion”; the nature of the procedure, its risks and possible alternatives; “[t]he probable gestational age of the fetus”; “medical risks associated with carrying the fetus to term”; and the availability of various techniques that would allow the woman to see an image of the fetus and hear its heartbeat.¹²⁵ The woman must also be informed of the availability of financial assistance to pay for childbirth, that the child’s father is legally required to provide financial support, and about adoption alternatives.¹²⁶ When there is a serious medical risk to the woman’s life or health, the eighteen-hour delay is not required.¹²⁷ The federal courts previously rejected a challenge to this statute.¹²⁸

The plaintiffs in the state-court challenge to the statute argued that it interfered with a woman’s right to make private medical decisions under article

122. 837 N.E.2d 973 (Ind. 2005).

123. The court first analyzed this statute in *A Woman’s Choice—East Side Women’s Clinic v. Newman*, 671 N.E.2d 104 (Ind. 1996), in which it answered a question certified by the United States District Court for the Southern District of Indiana seeking an interpretation of the medical necessity exception in the statute. In *Newman*, the court held that the medical emergency language allowed a physician to dispense with the waiting period when the physician determined, in a good faith exercise of clinical judgment, that all relevant factors led the physician to conclude that medical complications required therapeutic abortion to avoid serious and permanent physical or mental health consequences. *Id.* at 11. The author of this Article defended the statute in the United States District Court and argued the State’s position on the medical emergency provision in the Indiana Supreme Court.

124. IND. CODE § 16-34-2-1.1(a)(1) (2005).

125. *Id.*

126. *Id.* § 16-34-2-1.1(a)(2).

127. *Id.* § 16-34-2-1.1(a).

128. *A Woman’s Choice—East Side Women’s Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002), *reversing in part*, 132 F. Supp. 2d 1150 (S.D. Ind. 2001). The United States Supreme Court affirmed similar restrictions in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

I, section 1 of the Indiana Constitution.¹²⁹ This section states, in relevant part:

WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being.¹³⁰

The plaintiffs also made a substantive due process challenge under the state constitution and alleged that the mandated information violated the rights of plaintiffs and their physicians to free interchange of thought and opinion.¹³¹

As detailed in last year's developments, the Indiana Court of Appeals invalidated the statute when it addressed this case, finding that it intruded upon a woman's right to make medical decisions.¹³² The court of appeals found a privacy right in article I, section 1 and concluded that the privacy right protected an individual's right to make basic medical decisions, including the decision to have an abortion.¹³³ The court of appeals remanded to the trial court for fact-finding as to whether the statutes imposed a "material burden" on that right.¹³⁴ Judge Baker, concurring, would have held that the statute facially violated article I, section 21 because it imposed a special burden on a medical procedure used only by women.¹³⁵

The Indiana Supreme Court began its analysis of the statute by noting that no right to privacy has previously been found in the Indiana Constitution.¹³⁶ Defending the statute, attorneys for the State argued that the Indiana Constitution contains no such right.¹³⁷ The State went further, arguing that article I, section 1 contains no judicially enforceable rights.¹³⁸ The court did not decide whether

129. *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 977 (Ind. 2005).

130. IND. CONST. art. I, § 1.

131. *Clinic for Women*, 837 N.E.2d at 977.

132. *Clinic for Women, Inc. v. Brizzi*, 814 N.E.2d 1042 (Ind. Ct. App. 2004), *vacated by* 831 N.E.2d 735 (Ind. 2005).

133. *Id.* at 1048-49.

134. *Id.* at 1050-52 (Baker, J., concurring).

135. *Id.* at 1057-60.

136. *Clinic for Women*, 837 N.E.2d at 978. Previously, *Doe v. O'Connor*, 790 N.E.2d 985, 991 (Ind. 2003), declined to decide whether article I, section 1 presented an independently enforceable substantive right to privacy.

137. *Clinic for Women*, 837 N.E.2d at 978.

138. *Id.* Previous reported decisions found enforceable rights in article I, section 1, including the right to pursue a lawful occupation and the right to purchase and consume intoxicating liquor. *See, e.g.*, *Dept. of Ins. v. Schoonover*, 72 N.E.2d 747 (1947) (lawful occupation); *Herman v. State*, 8 Ind. 545 (1855) (intoxicating liquor). Article I, section 1, also was the source of the right to scalp tickets to the Indiana high school basketball championship competition (ruled to be a lawful occupation because it harmed no one). *Kirtley v. State*, 84 N.E.2d 712 (Ind. 1949). In *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005), the Indiana Court of Appeals cast doubt on the

article I, section 1 contains privacy protections. Instead, it ruled that if there is such a right in the Indiana Constitution, the restrictions of the abortion waiting-period statute would not violate it.¹³⁹

Both parties and the court agreed that the statute had to be analyzed using the framework of *Price v. State*,¹⁴⁰ the 1993 case stating that each portion of the Indiana Constitution contains a “core constitutional value” that the State, in the exercise of its police power, cannot “materially burden.”¹⁴¹ *Price* involved a criminal conviction for disorderly conduct arising from the defendant’s noisy complaints about police behavior in breaking up a party.¹⁴² In what is arguably the case inaugurating the modern era of interpretation of the Indiana Constitution, the Indiana Supreme Court ruled that *Price*’s profane comments were political speech because they related to police conduct; that political speech was a “core value” of article I, section 9 (the Free Expression Clause); and that the disorderly conduct statute could not be applied to condemn *Price*’s words because to do so would “materially burden” the “core value” of political speech.¹⁴³ The court defined “material burden” as a restriction on a core value of sufficient magnitude that the value “would no longer serve the purpose for which it was designed.”¹⁴⁴ Since *Price*, the court has recognized only one other “core value,” the right to corporate worship elucidated in *City Chapel Evangelical Free Inc. v. City of South Bend*.¹⁴⁵

Price also introduced the Indiana Supreme Court’s case-specific application of “core values,” a principle that turned out to be dispositive in *Clinic for Women*. The court found that “[u]nless the court concludes that the statute before it is incapable of constitutional application, it should limit itself to vindicating the rights of the party before it.”¹⁴⁶ In *Clinic for Women*, the challenge occurred before the statute went fully into effect, and the courts were presented with no individual woman’s claim that the statute impeded her right to obtain an abortion.¹⁴⁷ The court thus sidestepped the controversy in federal case law over what standard to apply in adjudicating facial challenges to abortion cases.¹⁴⁸ The Indiana Supreme Court clarified that plaintiffs have a “heavy burden” in facial challenges under Indiana law because they must show “that

validity of those decisions, lumping them in the category of discredited *Lochner*-era economic rights decisions of the United States Supreme Court. *Id.* at 31-33.

139. *Clinic for Women*, 837 N.E.2d at 975.

140. *Id.* at 978; 622 N.E.2d 954 (Ind. 1993).

141. *Price*, 622 N.E.2d at 960.

142. *Id.* at 956-57.

143. *Id.* at 961-64.

144. *Id.* at 960 n.7.

145. 744 N.E.2d 443 (Ind. 2001).

146. *Price*, 622 N.E.2d at 958.

147. *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 937, 979 (Ind. 2005).

148. See, e.g., *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 142-43 (3d Cir. 2000) (noting difference between standards under *United States v. Salerno*, 481 U.S. 739 (1987), and *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992)).

there are no set of circumstances under which the statute can be constitutionally applied.”¹⁴⁹

Applying this standard, the court in *Clinic for Women* concluded that the plaintiffs had failed to make allegations sufficient to support a claim that the eighteen-hour-waiting-period statute is invalid on its face.¹⁵⁰ The court found that concerns for a woman’s health raised by plaintiffs did not show facial invalidity because the medical emergency language in the law permitted judicial circumvention of the waiting period for all abortions deemed medically necessary.¹⁵¹ The court also ruled that the other potential consequences alleged by plaintiffs—that women will delay abortions, “travel to other states to obtain abortions, [c]arry pregnancies to term, or . . . [seek] alternatives to legal abortions”—are insufficient to facially invalidate the statute: “the fact that some unknown number of women may be adversely affected by the delay obviously means that not all or perhaps not even most will be so affected.”¹⁵² The court’s standard thus dictated its result—because it could not invalidate the statute so long as it could be applied in a constitutional manner to any set of facts, the law survived pre-application scrutiny.

The court went on to reject the dissent’s claim that the complaint at least stated a set of facts requiring trial, concluding instead that the statute could not constitute a “material burden” under article I, section 1.¹⁵³ For purposes of this analysis, the court equated the federal “undue burden” standard outlined in *Casey* (“placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus”¹⁵⁴) with the “material burden” standard enunciated in *Price* (if the core value “as impaired, would no longer serve the purpose for which it was designed, it has been materially impaired”¹⁵⁵). The court concluded that the two standards were “virtually indistinguishable” for purposes of evaluating the eighteen-hour-waiting-period statute.¹⁵⁶ The court stated “[b]oth tests avoid weighing the relative interests of the constitutional right and of the state regulation at issue in the case.”¹⁵⁷ “Instead, they measure the extent to which the state regulation impinges upon the central principle that the constitution protects.”¹⁵⁸ The court reinforced this conclusion by indicating that the right protected by *Casey* is similar to the article I, section 1 right plaintiffs alleged to be infringed in *Clinic for Women* because both rights address a woman’s inherent

149. *Clinic for Women*, 837 N.E.2d at 980 (citing *Baldwin v. Reagan*, 715 N.E.2d 332, 337 (Ind. 1999)).

150. *Id.* at 981.

151. *Id.* (citing *A Woman’s Choice—East Side Women’s Clinic v. Newman*, 671 N.E.2d 104, 110 (Ind. 1996)).

152. *Id.*

153. *Id.* at 982.

154. *Id.* (quoting *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 877 (1992)).

155. *Id.* at 983.

156. *Id.* at 983-84.

157. *Id.* at 984.

158. *Id.*

right to autonomy in reproductive choice.¹⁵⁹

Because the court equated “material burden” with “undue burden,” it next looked to other jurisdictions’ applications of the “undue burden” standard to eighteen-hour waiting period statutes like Indiana’s.¹⁶⁰ The court began with *Casey*, which held that a twenty-four-hour-waiting-period statute did not constitute an undue burden.¹⁶¹ *Casey* concluded that the waiting period created a burden on the abortion right by requiring women to visit a medical facility twice, just as plaintiffs alleged in *Clinic for Women*.¹⁶² But *Casey* concluded that the burden was not undue because “a State is permitted to enact persuasive measures which favor childbirth over abortion” and the statute presented no real medical risk in light of the medical emergency exception.¹⁶³ The Indiana Supreme Court also had before it the Seventh Circuit’s review of the Indiana statute under the “undue burden” standard in *A Woman’s Choice*, in which the Seventh Circuit found that the eighteen-hour waiting period was not an “undue burden.”¹⁶⁴

Because the Indiana Supreme Court previously had ruled that the federal “undue burden” standard and state “material burden” standard were essentially identical in this context, the court’s application of *Casey* and the federal decisions addressing the Indiana statute made its conclusion foregone. The court concluded that the statute did not violate any privacy right that may reside in article I, section 1.¹⁶⁵ The court also concluded that it could reach this decision without the factual inquiry mandated by the Indiana Court of Appeals’ decision, but its reasoning on that point is less clear. It relied on the Seventh Circuit’s decision to conclude that no trial was required to determine the extent of impairment the waiting period might entail.¹⁶⁶ This reliance apparently stemmed from its equation of the “undue burden” and “material burden” standards, coupled with the Seventh Circuit’s emphasis on creating a uniform national standard.¹⁶⁷ Because the federal and state standards were essentially the same, the Indiana Supreme Court needed no factual inquiry to determine that the statute did not sufficiently burden any privacy right to be facially invalid.¹⁶⁸

Justice Dickson wrote a lengthy concurrence in the result based on a more far-reaching theoretical basis: He found no right to abortion in the Indiana

159. *Id.*

160. *Id.* at 984-87.

161. *Id.* at 985 (analyzing *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 846-87 (1992)).

162. *Id.* (discussing *Casey*, 505 U.S. at 885-87).

163. *Id.* (quoting *Casey*, 505 U.S. at 886).

164. *Id.* at 986 (analyzing *A Woman’s Choice—East Side Women’s Clinic v. Newman*, 305 F.3d 684, 692 (7th Cir. 2002)).

165. *Id.* at 986-88.

166. *Id.* at 986.

167. *Id.* (citing *A Woman’s Choice*, 305 F.3d at 688, 691-92).

168. *Id.*

Constitution.¹⁶⁹ He also found the State's desire to protect unborn life to be entirely consistent with article I, section 1's declaration of an inalienable right to life.¹⁷⁰

Using his common approach, Justice Dickson approached the question historically.¹⁷¹ He found it "inconceivable . . . that our Constitution's framers intended to create a right to abortion."¹⁷² At the time of ratification and thereafter, abortion was a crime in Indiana.¹⁷³ He also found that a right to abortion is inimical to the expressed protection for life and the delegation to government to provide for "the peace, safety, and well-being" of its citizens, both in article I, section 1.¹⁷⁴ He found the eighteen-hour waiting period to be "important protection[] for the safety and well being of pregnant women contemplating an abortion," citing articles regarding harmful psychological consequences of abortion.¹⁷⁵ He concluded that "[b]ecause of my firm conviction that the Indiana Constitution does not recognize or protect any right to abortion, these issues regarding how and whether the material burden test applies do not arise and are unnecessary to address."¹⁷⁶

Justice Boehm dissented, finding in article I, section 1 a liberty right "includ[ing] the right of a woman to choose for herself whether to terminate her pregnancy, at least where there is no viable fetus or her health is at issue."¹⁷⁷ He would have affirmed the court of appeals' disposition, requiring a trial to determine whether the waiting period presented a "material burden" on rights protected by the Indiana Constitution.¹⁷⁸

Justice Boehm first disputed the State's contention that article I, section 1 lacks substantive content.¹⁷⁹ He found both textual and historical support for the proposition that the liberty right in section 1 is "intended to limit legislative discretion and [is] judicially enforceable."¹⁸⁰ Indiana's current Bill of Rights was adopted after the right to judicial enforcement of constitutional rights and judicial review of statutes were well established at the federal level.¹⁸¹ Justice Boehm also cited excerpts from the constitutional debates indicating that delegates wanted a strong statement of natural rights in the first section of the

169. *Id.* at 988 (Dickson, J., concurring).

170. *Id.*

171. *See, e.g.,* City Chapel Evangelical Free, Inc. v. City of South Bend, 744 N.E.2d 443 (Ind. 2001) (illustrating Justice Dickson's historical approach); Richardson v. State, 717 N.E.2d 32 (Ind. 1999) (same).

172. *Clinic for Women*, 837 N.E.2d at 989.

173. *Id.*

174. *Id.* at 990.

175. *Id.* at 991 & n.4, 992.

176. *Id.* at 994 (Boehm, J., dissenting).

177. *Id.*

178. *Id.* at 995.

179. *Id.* at 996.

180. *Id.* at 996-98.

181. *Id.* at 996-97.

Constitution.¹⁸² He also cited the early cases of *Herman v. State*¹⁸³ and *Beebe v. State*,¹⁸⁴ as well as later cases applying article I, section 1, for the principle that the Constitution protects a liberty right.¹⁸⁵ Justice Boehm concluded that “Article I, section 1 does indeed have substance and is designed to assure all persons in this state ‘certain inalienable rights’ which are enforceable by the courts.”¹⁸⁶

He went on to conclude that the Framers’ notion of “liberty” as of 1851 is not “frozen.”¹⁸⁷ Various rights, including a woman’s right to own property, have developed since the current Constitution was written.¹⁸⁸ Justice Boehm also noted that the constitutional debates themselves contemplated that rights would continue to develop and expand.¹⁸⁹ He pointed to *In re Lawrance*,¹⁹⁰ a case implicating the “right to die,” as an example of the expansion of the liberty right beyond what the Framers might have imagined.¹⁹¹

Justice Boehm noted that although the United States Constitution contains no enumerated protection for “liberty,” the Indiana Constitution does spell out that right in article I, section 1.¹⁹² The roots of the Indiana Constitution—often mentioned in other cases¹⁹³—in frontier Jacksonianism caused the Framers to emphasize individual rights more, and more explicitly, than the Federal Constitution does. Justice Boehm stated that the Framers of the Indiana Constitution “would have readily embraced the ‘right to be let alone’ [Justice Brandeis’s phrase, not yet coined in 1851] as a fair summary of one incident of what they were getting at in assuring the rights to ‘life, liberty, and the pursuit of happiness.’”¹⁹⁴ He also linked the Framers’ emphasis on liberty to the natural rights philosophy that served as a basis for the Indiana Bill of Rights.¹⁹⁵

Justice Boehm further stated that because the abortion decision is “intensely personal” and each individual’s decision will weigh and value different factors, it is less amenable to state regulation than areas in which there is a basic social consensus.¹⁹⁶ He argued, “I believe one of these core values [under the Indiana Constitution] is the right to be free from legislation that restricts individual

182. *Id.* at 997.

183. 8 Ind. 545 (1855).

184. 6 Ind. 501 (1855).

185. *Clinic for Women*, 837 N.E.2d at 998 n.17.

186. *Id.* (quoting IND. CONST. art. I, § 1).

187. *Id.* at 999.

188. *Id.*

189. *Id.* at 1000.

190. 579 N.E.2d 32 (Ind. 1991).

191. *Clinic for Women*, 837 N.E.2d 1000-01 (Boehm, J., dissenting) (citing *In re Lawrance*, 579 N.E.2d at 44).

192. *Id.* at 1001-02.

193. See, e.g., *D&M Healthcare, Inc. v. Kernan*, 800 N.E.2d 898, 901 n.3 (Ind. 2003); *Price v. State*, 622 N.E.2d 954, 961-62 (Ind. 1993).

194. *Clinic for Women*, 837 N.E.2d at 1002.

195. *Id.* at 1003-04.

196. *Id.* at 1004.

liberty based on essentially philosophical or religious views as to which there is no general consensus.”¹⁹⁷ He drew support for this assertion from the debates over the 1851 Constitution.¹⁹⁸ Because the abortion decision involves the exercise of an individual’s conscience, a right respected by the Framers, Justice Boehm concluded that the right to make one’s own decision about abortion is protected by the Constitution.¹⁹⁹

Justice Boehm concluded his opinion by analyzing whether the waiting-period statute burdens that protected right. Contrary to the majority’s equation of the federal standard with the state standard, Justice Boehm concluded that the “material burden” standard of Indiana law is a stronger protection of individual rights than the federal standard and, therefore, *Casey* provides unreliable guidance.²⁰⁰ Citing *Price*, he concluded that core values are not subject to balancing against the State’s interest in regulation.²⁰¹ Instead, the “material burden” analysis looks only at the burden a restriction places on the core constitutional right.²⁰² He concluded that the allegations of the complaint, if proven, were sufficient to show material burden, and he therefore would have affirmed the court of appeals’ decision to remand the matter for trial as to whether the statute would create a material burden as applied.²⁰³

Clinic for Women illustrates the current state of analysis under the Indiana Bill of Rights. First, *Price*’s requirement that the Constitution be applied only to actual facts presented by a specific plaintiff makes it nearly impossible to facially invalidate a statute. As discussed in more detail in Part II.B below, this framework limits the courts’ ability to imagine or address circumstances where likely violations of the Bill of Rights occur, outside the circumstances of the particular plaintiff who happens to be before the court.

Moreover, the court’s decision to equate the federal “undue burden” standard with Indiana’s “material burden” dictated the case’s outcome. The two standards arise from quite different contexts, and it is not obvious why they would apply identically in this case. The court’s choice to equate the standards implied that “core values” under the Indiana Constitution (“a cluster of essential values which the legislature may qualify but not alienate”²⁰⁴) are equivalent to a woman’s right to choose abortion under the Federal Constitution, a right that has been progressively qualified over the years since *Roe v. Wade* as the U.S. Supreme Court permitted various state actions to promote the countervailing value of protecting fetal life. Equating the right to choose abortion (which is qualified by the states’ interest in protecting fetal life) to the right to political speech or to group worship is not an obvious conclusion, and the court’s choice to do so may

197. *Id.* at 1005.

198. *Id.*

199. *Id.*

200. *Id.* at 1006-07.

201. *Id.* at 1006.

202. *Id.* at 1007.

203. *Id.* at 1007-08.

204. *Price v. State*, 622 N.E.2d 954, 960 (Ind. 1993).

expose existing and yet-to-be-identified “core values” to a degree of restriction beyond that implied in *Price* and *City Chapel*.

Also, the concept of “core value” remains largely inchoate. *Price* and *City Chapel* enumerated the core values of political speech and corporate worship, but both the framework for discovering core values, and the actual identification of those values, remains an infant enterprise. If ours is to remain a state constitutional jurisprudence of original intent, it is difficult to disagree with Justice Boehm’s assertion that privacy is a core value.²⁰⁵ Imbued with Jacksonian idealism and individualism as the framers were, it is difficult to conceive that they would countenance many of the intrusions on privacy permitted in today’s society. The lack of significant discussion of privacy-type concerns in the debates on the Constitution is as likely attributable to the framers’ inability to conceive of the scope of government invasion of the personal sphere that exists today as it is to any other cause. The framers’ world view was characterized by distrust of government, and it is difficult to imagine that they would support governmental interference with significant private choices.²⁰⁶

B. Equal Privileges

The Indiana Court of Appeals applied the Equal Privileges and Immunities Clause of article I, section 23 in *Morrison v. Sadler*,²⁰⁷ a case that will not be reviewed by the Indiana Supreme Court because neither party sought transfer. The case upheld Indiana’s “Defense of Marriage” statute,²⁰⁸ which provides that marriage must be between a man and a woman and thus outlaws same-sex marriage.²⁰⁹ Judge Barnes wrote the opinion, in which Chief Judge Kirsch and Judge Friedlander concurred in result (with only Judge Friedlander writing separately).²¹⁰ This array means that there is no majority for the opinion’s reasoning, only for its result.

The plaintiffs based their state constitutional challenge primarily on article I, section 23.²¹¹ Indiana’s well-established standard for adjudicating such claims

205. The Indiana Supreme Court has stated that interpreting the Indiana Constitution requires “a search for the common understanding of both those who framed it and those who ratified it. Furthermore, the intent of the framers of the Constitution is paramount in determining the meaning of a provision.” *City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E.2d 443, 447 (Ind. 2001) (internal quotation marks omitted) (quoting *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 986 (Ind. 2000) (Dickson, J., dissenting)).

206. This conclusion does not mean that the framers would have voted the other way in *Clinic for Women*. Justice Dickson correctly counterbalances any privacy concern against protection of fetal life, another interest the framers might have held dear.

207. 821 N.E.2d 15 (Ind. Ct. App. 2005).

208. IND. CODE § 31-11-1-1 (2005).

209. *Morrison*, 821 N.E.2d at 35.

210. *See id.* at 18, 35 (Friedlander, J., concurring).

211. *Id.* at 21 (plurality opinion). The court of appeals noted that “[t]here is binding United

involves a two-part test initially set forth in *Collins v. Day*.²¹² First, the disparate legislative treatment given to one group “must be reasonably related to inherent characteristics” that distinguish the group.²¹³ Second, the different treatment “must be uniformly applicable and equally available to all persons similarly situated.”²¹⁴ As a final step, this test is applied with deference to legislative classifications.²¹⁵ The court of appeals also noted that, under binding precedent, only disparate treatment—not legislative purpose—is at issue on judicial review, and legislative motives do not become an issue unless the lines drawn by the General Assembly appear arbitrary or manifestly unreasonable.²¹⁶

The court of appeals further summarized the test as follows:

The practical effect of *Collins* and cases following it is that statutes will survive Article 1, § 23 scrutiny if they pass the most basic rational relationship test. In fact, our research has revealed that of the approximately ninety reported “Equal Privileges and Immunities” cases following *Collins* and its clarification of Article 1, § 23 analysis, only three have finally resulted in holdings (after supreme court review) that a particular statute violated Article 1, § 23 [all as applied]. . . . No statute or ordinance has ever been declared facially invalid under the *Collins* test.²¹⁷

The court analyzed the plaintiffs’ claims under this relaxed formulation.

The plaintiffs argued that Indiana’s ban on same-sex marriage was not reasonably related to differences between the two statutory classifications—same-sex couples and opposite-sex couples.²¹⁸ The court indicated that it had only to find one reasonable basis on which the classes could

States Supreme Court precedent indicating that state bans on same-sex marriage do not violate the United States Constitution” because an appeal in *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), was dismissed for want of a substantial federal question. *Baker v. Nelson*, 409 U.S. 810 (1972). Under rules effective at that time, the Supreme Court’s dismissal of the appeal on that ground represented a determination on the merits that the federal claim was insubstantial that is binding on the lower courts. *Morrison*, 821 N.E.2d at 20. The court of appeals noted that the U.S. Supreme Court’s more recent decision invalidating anti-sodomy legislation explicitly declined to address same-sex marriage. *Id.* at 20 (citing *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

212. 644 N.E.2d 72 (Ind. 1994).

213. *Morrison*, 821 N.E.2d at 21 (citing *Collins*, 644 N.E.2d at 80).

214. *Id.*

215. *Id.*

216. *Id.* at 21-22 (citing *Dvorak v. City of Bloomington*, 796 N.E.2d 236, 239 (Ind. 2003); *Collins*, 644 N.E.2d at 80).

217. *Id.* at 22. The three cases invalidating statutes on an as-applied basis under article I, section 23 are *Martin v. Richey*, 711 N.E.2d 1273, 1285 (Ind. 1999) (invalidating medical malpractice statute of limitations as to particular plaintiff); *Van Dusen v. Stotts*, 712 N.E.2d 491 (Ind. 1999) (same); and *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247, 270-71 (Ind. 2003) (invalidating statutory ban on Medicaid payment for abortions as applied to a class of women).

218. *Morrison*, 821 N.E.2d at 22.

be treated differently to uphold the statutory classification.²¹⁹ The court noted two of the plaintiffs' arguments—that recognizing same-sex marriages would not harm opposite-sex marriages and that recognizing same-sex marriages would promote the purpose of Indiana's Family Law Code to protect children—but found that neither addressed the section 23 claim.²²⁰

The court found justification for the legislative classification in “the key difference between how most opposite-sex couples become parents, through sexual intercourse, and how all same-sex couples must become parents, through adoption or assisted reproduction.”²²¹ The methods same-sex couples must use to obtain children, including assisted reproduction techniques and adoption, require preparation, planning, and financial investment.²²² In contrast, reproduction through sexual intercourse may occur without “foresight or planning.”²²³

These differences affect “the State of Indiana's clear interest in seeing that children are raised in stable environments.”²²⁴ The State may assume that same-sex couples, who already have taken time to plan and finance a child through adoption or assisted reproduction, will provide a stable and safe home “without the ‘protections’ of marriage, because of the high level of financial and emotional commitment exerted in conceiving or adopting a child or children in the first place.”²²⁵

Because heterosexual couples may conceive, in contrast, “without any thought for the future,” the State “may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from ‘casual’ intercourse.”²²⁶ In other words, the court concluded, marriage provides an incentive for opposite-sex couples to stay together to raise unplanned children in a stable environment.²²⁷

The court of appeals concluded that this difference was sufficient to support the statutory classifications.²²⁸ The court further concluded that studies showing a growing number of same-sex couples raising children were irrelevant to its decision, such facts falling within the legislature's province to address.²²⁹

The court next addressed the plaintiffs' argument that “it is irrational to justify opposite-sex only marriage on procreative grounds because there is no

219. *Id.* at 23.

220. *Id.*

221. *Id.* at 24.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 24-25.

228. *Id.* at 27.

229. *Id.* at 27-28.

requirement that couples wishing to marry prove their fertility or willingness to procreate” and couples clearly unable to procreate are permitted to marry.²³⁰ The court dismissed the argument, stating that legislative classifications are not to be condemned because they are overbroad.²³¹ The court also discussed and distinguished opinions from other states finding a right to same-sex marriage or civil union under state constitutions.²³² In summary, the court of appeals concluded that the State’s interest in protecting a child born from heterosexual relations is sufficient to justify different treatment of same-sex and opposite-sex marriages.²³³

The court of appeals also rejected the plaintiffs’ claim based on a right to privacy in article I, section 1.²³⁴ The court expressed doubt that this section is “capable of independent judicial enforcement.”²³⁵ The court then looked at several cases in which the Indiana Supreme Court had found enforceable rights in article I, section 1, including the right to pursue a lawful occupation.²³⁶ The court expressed some affinity with the State’s argument that these cases, all of which are more than fifty years old, may have fallen into desuetude with the U.S. Supreme Court’s *Lochner*-era rulings expressing outdated views on economic regulation.²³⁷

The court did not resolve these questions, but instead determined that even if a right to privacy is a “core value” under the Indiana Constitution, it does not convey a right to same-sex marriage.²³⁸ The court could find nothing in Indiana’s constitutional history indicating that the right to marry is a “core value,” and it found no support in decisions from other jurisdictions for giving any special, “core value”-type, protection to same-sex marriage.²³⁹ The court concluded, “[t]o the extent that Article 1, § 1, may contain some guarantee of minimal governmental interference in private affairs, the Plaintiffs have failed to convince us that it contemplates as a ‘core value’ that the government must act affirmatively to extend the benefits of marriage to any particular couple.”²⁴⁰

230. *Id.* at 27.

231. *Id.* (citing *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994)).

232. *Id.* at 27-29 (addressing *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), and *Baker v. State*, 744 A.2d 864 (Vt. 1999)). The court of appeals found support for its ruling in *Standhardt v. Superior Court, County of Maricopa*, 77 P.3d 451 (Ariz. Ct. App. 2003), and two Canadian cases, *EGALE Canada, Inc. v. Canada*, 225 D.L.R. 472, and *Halpern v. Toronto*, 225 D.L.R. 529.

233. *Morrison*, 821 N.E.2d at 30-31.

234. *Id.* at 34.

235. *Id.* at 31 (citing *Doe v. O’Connor*, 790 N.E.2d 985, 991 (Ind. 2003), for the proposition that article I, section 1 may not provide a standard allowing for judicial enforcement of privacy).

236. *Id.* at 31-32.

237. *Id.* at 32 (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

238. *Id.* at 33-34.

239. *Id.* at 33.

240. *Id.* at 34. The court also rejected a claim under a state constitutional substantive due process theory. *Id.* at 34-35.

The court therefore found no basis—either in the provision governing classifications or the provision potentially containing a right to privacy—for extending marriage to same-sex couples as a state constitutional right. Judge Friedlander wrote separately to clarify that the court’s opinion related only to the legality, not the morality, of same-sex marriage and that the court was prohibited from inquiring into the legislative motives for the statute restricting marriage to opposite-sex couples.²⁴¹

Although the conclusion the court of appeals reached is unsurprising, two items within its analysis bear further discussion. First, the court’s dismissive analysis of the “overbreadth” argument may fail to fully apply the provisions of the *Collins* test (perhaps because the parties did not assert the point). The court quoted *Collins* for the proposition that overbreadth does not condemn a statutory classification, but that statement seems inconsistent with the second step of *Collins*’s two-part analysis, requiring that “preferential treatment . . . be uniformly applicable and equally available to all persons similarly situated.”²⁴²

If the “inherent characteristic” justifying different treatment of opposite-sex couples under the first prong of the test is their ability to procreate without planning, how does the requirement of uniform applicability to “all persons similarly situated” under the second prong stretch to those who are plainly unable to procreate? The characteristic justifying the disparate treatment, procreation without assistance, is not possessed by everyone in the category receiving the benefit. In other words, as to the trait at issue, opposite-sex couples who are unable to procreate without assistance are more similar to same-sex couples than to opposite-sex couples who can procreate without help, yet all the opposite-sex couples receive the benefit. Perhaps the court of appeals applied the *Collins* test correctly, but an explanation addressing this apparent inconsistency would have made the court’s conclusion easier to understand.

Second, and more broadly, the court’s general discussion of the *Collins* standard points out its toothlessness since it was implemented in 1994. *Collins* gave life to section 23 independent of the federal Equal Protection Clause, and the two-part standard avoided the problems arising from the multi-tiered “levels of scrutiny” analysis in the federal standard. For a time, it appeared that the *Collins* standard would generate a cognate problem, arising from how to define the classes to be compared for section 23 purposes.²⁴³ That problem has not presented itself in the past couple of years.

Instead, as Judge Barnes’s opinion indicates, what appeared to be the key innovation in the *Collins* standard—the requirement that “inherent differences” between the classes support different legislative treatment—has transformed into mere rational basis review.²⁴⁴ Thus, the standard under section 23 is the same as the less exacting of the two standards applied to evaluate claims under the Due Process Clause.

241. *Id.* at 36 (Friedlander, J., concurring).

242. *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994).

243. *See Laramore, supra* note 1, at 961-62.

244. *Morrison*, 821 N.E.2d at 22.

This degradation of the standard has been compounded by the supreme court's instruction in *Price* that courts should not look beyond the facts presented by a given plaintiff in evaluating the constitutionality of a statute unless there is no conceivable circumstance in which the statute may be applied constitutionally.²⁴⁵ With this approach, it is no surprise that no statute has ever been found facially invalid using the *Collins* standard. In his seminal 1989 article, Chief Justice Shepard stated that several sections of the Indiana Constitution lacking direct federal constitutional cognates "clearly provide occasions when a litigant who would lose in federal court may win in state court."²⁴⁶ In the intervening seventeen years, this promise has occasionally been fulfilled.²⁴⁷ But section 23 has not proved to be a consistent source of individual rights or of limitations on legislative authority, as the cases decided during the survey period show.

The court of appeals addressed section 23 in several other cases decided during the survey period, applying a standard similar to that elucidated in *Morrison*. In *Bloomington Country Club, Inc. v. City of Bloomington Water & Wastewater Utilities*,²⁴⁸ the court approved a separate "irrigation rate" charged to the country club for water use that was higher than the ordinary rate for water use.²⁴⁹ The court rejected the country club's argument that the rate violated section 23, ruling that the disparate treatment was reasonably related to the country club's different water use history.²⁵⁰ *Gray v. Daimler Chrysler Corp.*²⁵¹ analyzed a claim that the three-year claim period in the worker's compensation statute violated section 23 because it penalized individuals whose occupational diseases had long latency periods (here, silicosis with an onset more than ten years after employment ended).²⁵² The court declined to invalidate the statute, finding that it was legitimate for the General Assembly to treat long-onset illnesses differently than those with shorter latency periods:

Here, our legislature has struck an economic balance between the interests of individuals who suffer from occupational diseases and their employers. The statute of repose . . . reflects the legislative determination that disablement occurring more than three years after the employee's last work-related exposure to silica dust is not an injury for

245. See *Price v. State*, 622 N.E.2d 954, 958 (Ind. 1993).

246. Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575, 583 (1989).

247. For example, in claims involving article I, sections 11 and 14, rights broader than those the Federal Constitution provides have been established under the Indiana Constitution. See, e.g., *infra* Part II.C-D.

248. 827 N.E.2d 1213 (Ind. Ct. App. 2005), *trans. dismissed* (Ind. 2006).

249. *Id.* at 1216-17.

250. *Id.* at 1221.

251. 821 N.E.2d 431 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App. 2005).

252. *Id.* at 438-41.

which employers should be liable.²⁵³

*Horn v. Hedrickson*²⁵⁴ addressed another wrongful death claim, analyzing whether parents could recover for the death of a viable fetus.²⁵⁵ The Indiana Court of Appeals ruled that it was bound by the supreme court's ruling in *Bolin v. Wingert*²⁵⁶ to hold that parents of viable fetuses have no right to recover under the child wrongful death statute.²⁵⁷ In an opinion by Judge Najam, the court went on to analyze this limitation under section 23.²⁵⁸ It concluded that there was no "inherent difference" for section 23 purposes between parents of viable fetuses wrongfully killed (who cannot recover damages) and parents of live children wrongfully killed (who can).²⁵⁹ Thus, absent the Indiana Supreme Court's controlling precedent, the court would have ruled that the statute precluding damages for wrongfully killed viable fetuses violated section 23.²⁶⁰ The court urged the supreme court to reconsider *Bolin* on section 23 grounds.²⁶¹

C. Search

The Indiana Supreme Court substantially clarified the analysis used in determining what constitutes a reasonable search under article I, section 11 in *Litchfield v. State*,²⁶² a unanimous opinion written by Justice Boehm. *Litchfield* analyzed a search of trash belonging to individuals identified as potential drug dealers.²⁶³ The garbage was taken from the area where it was ordinarily picked up, and a search of its contents revealed items relating to marijuana.²⁶⁴ A subsequent search of the Litchfields' home uncovered fifty-one marijuana plants being cultivated on the back deck.²⁶⁵

The Litchfields challenged the search as violating the Fourth Amendment and section 11. The court quickly disposed of the federal constitutional argument, noting that there is no reasonable expectation of privacy in garbage left out for pickup under *California v. Greenwood*.²⁶⁶

The court went on to perform the separate analysis required by the Indiana Constitution, noting that Indiana has explicitly rejected the "expectation of

253. *Id.* at 441.

254. 824 N.E.2d 690 (Ind. Ct. App. 2005).

255. *Id.* at 693.

256. 764 N.E.2d 201 (Ind. 2002).

257. *Horn*, 824 N.E.2d at 694 (citing *Bolin*, 764 N.E.2d at 201).

258. *Id.* at 701-03.

259. *Id.* at 702-03.

260. *Id.*

261. *Id.* at 703. Judge Mathias concurred in result, stating that *Bolin* was an adequate basis for the court's decision and did not merit reconsideration. *Id.* at 704-05 (Mathias, J., concurring).

262. 824 N.E.2d 356 (Ind. 2005).

263. *Id.* at 357.

264. *Id.* at 357-58.

265. *Id.* at 358.

266. 486 U.S. 39 (1988).

privacy” approach embodied in the federal test.²⁶⁷ Instead, “[t]he legality of a governmental search under the Indiana Constitution turns on an evaluation of the reasonableness of the police conduct under the totality of the circumstances.”²⁶⁸ But, the court noted, “we have not explicitly addressed whether ‘reasonableness’ is to be evaluated from the perspective of the investigating officer . . . or the subject of the search . . . or both.”²⁶⁹

The court indicated that the determination of reasonableness “requires consideration of both the degree of intrusion into the subject’s ordinary activities and the basis upon which the officer selected the subject of the search or seizure.”²⁷⁰ Citing several past decisions, the court indicated that arbitrary selection of the subject is likely to make the search unreasonable.²⁷¹ Because the reasonableness determination involves balancing the degree of intrusion against other factors, a search may be unreasonable even if there is some indication of criminal activity while another may be reasonable even if there is no such indication (specifically, in the case of random drug tests of certain high school students).²⁷² As another example of balancing, when a violation of law is established most seizures will be upheld.²⁷³ The court restated the balancing test as involving: “1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen’s ordinary activities, and 3) the extent of law enforcement needs.”²⁷⁴

The court then specifically addressed trash searches. The court discussed *Moran v. State*,²⁷⁵ in which the majority affirmed a search of trash left at the curb.²⁷⁶ *Moran* noted that “Hoosiers are not entirely comfortable with the idea of police officers casually rummaging through trash left at curbside.”²⁷⁷ The dissent in *Moran* argued that the search was unreasonable because trash may reveal intimate details of an individual’s life and there is no way to dispose of

267. *Litchfield*, 824 N.E.2d at 359.

268. *Id.* (citing *Moran v. State*, 644 N.E.2d 536, 539 (Ind. 1994)).

269. *Id.* at 360.

270. *Id.*

271. *Id.* (citing *State v. Gerschoffer*, 763 N.E.2d 960, 966 (Ind. 2002) (discussing neutral criteria for stopping motorists at drunk driving roadblock); *Baldwin v. Reagan*, 715 N.E.2d 332, 334 (Ind. 1999) (holding that motorists may not be stopped arbitrarily under authority of seatbelt law and may be stopped only when violation is observed)).

272. *Id.* (citing *State v. Bulington*, 802 N.E.2d 435 (Ind. 2004) (finding search unreasonable even though some indication of criminal activity was present); *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972, 985 (Ind. 2002) (approving random drug tests of some high school students under certain circumstances)).

273. *Id.* at 361 (citing *Mitchell v. State*, 745 N.E.2d 775, 787 (Ind. 2001)).

274. *Id.*

275. 644 N.E.2d 536 (Ind. 1994).

276. *Id.* at 542.

277. *Id.* at 541.

trash other than through public collection.²⁷⁸ The court also discussed more recent trash search decisions by the court of appeals, some of which sought to draw a bright line invalidating searches that required law enforcement personnel to trespass to obtain the discarded trash.²⁷⁹

The court rejected the bright-line approach and also rejected the approach taken by some other states that ruled all trash searches unconstitutional.²⁸⁰ The court concluded, however, that searching trash left out for pickup involves no intrusion on an owner's liberty or property interests.²⁸¹ Once trash is set out to be discarded, the owner invites the trash collector to remove it and dispose of it.²⁸² A police officer can perform a search with no greater intrusion than the trash collectors picking up trash in the ordinary course of their job.²⁸³ Thus, the balancing test puts no weight on intrusion in the context of trash abandoned for collection.

But the determination that searching trash set out for collection involves no intrusion is not the end of the matter because, under the court's formulation, it matters how the police chose which trash to search. "[I]t is not reasonable for law enforcement to search indiscriminately through people's trash."²⁸⁴ The court determined that "a requirement of articulable individualized suspicion, essentially the same as is required for a 'Terry stop' of an automobile, imposes the appropriate balance between the privacy interests of citizens and the needs of law enforcement."²⁸⁵ Random searches of garbage would be unreasonable.²⁸⁶

The court remanded *Litchfield* for additional fact-finding about how the police chose to search the trash in question.²⁸⁷ Because the trash had been set out for pickup, the owners had abandoned possessory interest in it and police could access it in the same manner as trash collectors.²⁸⁸ But police could do so only if they had "articulable individualized suspicion" of drug activity at the Litchfield household.²⁸⁹

This analytical framework considerably advances the former "totality of the circumstances" approach to the reasonableness of searches under section 11.²⁹⁰ The court spelled out in some detail the framework to be used in judging the reasonableness of trash searches, and Indiana's appellate courts can spawn similar formulae for other types of searches. The case articulated two or three

278. *Id.* at 543 (Dickson, J., concurring and dissenting).

279. *Litchfield*, 824 N.E.2d at 362.

280. *Id.* at 362-63.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* at 364.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *See id.* at 359.

factors to be balanced when judging reasonableness, but it remains to be seen how well these factors can be adapted to the diverse circumstances in which questions arise under section 11.

The Indiana Court of Appeals applied Indiana's developing search doctrine in several cases, decided both before and after *Litchfield*. These cases continue the trend, noted in last year's article, of court of appeals cases applying article I, section 11 to give additional depth and meaning to the reasonableness test enunciated by the Indiana Supreme Court and to differentiate rights under the Indiana Constitution from Fourth Amendment rights.²⁹¹

The court of appeals applied *Litchfield* quite directly in *Edwards v. State*,²⁹² analyzing a search of trash left out for pickup. The marijuana detritus found in the trash allowed police to obtain a search warrant for the home, where they found more contraband leading to a marijuana possession conviction.²⁹³ The court relied on *Litchfield*'s conclusion that trash put out for pickup is abandoned by its owner so that a search intrudes on none of the owner's interests.²⁹⁴ The court went on to analyze whether police had a "reasonable, articulable suspicion" to justify the trash search.²⁹⁵ Police targeted Edwards based on information from a confidential informant.²⁹⁶

Analyzing all the facts, the court determined that "the [informant's] tip was lacking in indicia of reliability and the credibility of the informant was not established, [so] the tip was inadequate to support the reasonable suspicion necessary, under *Litchfield*, to search the trash."²⁹⁷ The court nevertheless did not suppress the evidence from the trash search because it determined that police had a good faith belief, under pre-*Litchfield* law in effect at the time of the search, that the warrant was based on probable cause.²⁹⁸ The court therefore affirmed the conviction.²⁹⁹

The court looked at an automobile search in *Cheatham v. State*.³⁰⁰ An officer stopped Cheatham for a seat belt violation, and Cheatham pulled over into a service station.³⁰¹ After learning that Cheatham did not have a valid license, the officer refused to let Cheatham drive away.³⁰² While Cheatham was trying to find someone who would move his car, the police used a drug-sniffing dog on the car, and the dog indicated the presence of drugs. Cheatham left the scene, and

291. See Laramore, *supra* note 3, at 984-87.

292. 832 N.E.2d 1072 (Ind. Ct. App. 2005).

293. *Id.* at 1074.

294. *Id.* at 1075.

295. *Id.*

296. *Id.*

297. *Id.* at 1076.

298. *Id.* at 1077.

299. *Id.* at 1080.

300. 819 N.E.2d 71 (Ind. Ct. App. 2004), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 744 (Ind. 2005).

301. *Id.* at 73.

302. *Id.*

police found various controlled substances when they searched the car. The court found the warrantless search permissible under the automobile exception to the Fourth Amendment.³⁰³ Under section 11, the court found the police conduct reasonable because, although there was little danger that Cheatham would move the car before police could get a warrant, the car was parked near the gas pumps and a service station attendant asked police to move it.³⁰⁴ The search had to be done quickly because the car was blocking a commercial (although not public) way, and it was therefore reasonably done without a warrant.³⁰⁵

In contrast, the court found an automobile search invalid in *Bell v. State*.³⁰⁶ Officers pulled Bell over for reasons not entirely clear on the record.³⁰⁷ Police questioned Bell and removed a handgun from the car after Bell indicated that he had one.³⁰⁸ Although Bell testified that he told police he had a permit for the gun, they never checked his wallet (Bell was handcuffed).³⁰⁹ Instead, police searched the car and dismantled the glove compartment, reaching into the chassis of the car to find cocaine.³¹⁰ The court invalidated this search as unreasonable for several reasons.³¹¹ First, the search was not incident to a lawful arrest because police had no grounds for an arrest at the time they took Bell into custody.³¹² Second, police were in no danger from anything in the car because Bell was handcuffed and had been patted down, and they removed the gun he said was inside the car.³¹³ Finally, the search went well beyond the passenger compartment of the car, extending to the chassis after officers dismantled the glove compartment: “we do not believe that citizens of Indiana would countenance this type of warrantless search that occurred here.”³¹⁴ The court ruled that the evidence should be suppressed.³¹⁵

Under different circumstances, the court approved a car search in *Abran v. State*.³¹⁶ Conservation officers stopped Abran’s truck, after a chase, because there was a warrant for his arrest.³¹⁷ Police found a substance appearing to be methamphetamine in Abran’s pocket when they searched him. They then

303. *Id.* at 75-76.

304. *Id.* at 77.

305. *Id.* at 78.

306. 818 N.E.2d 481 (Ind. Ct. App. 2004).

307. *Id.* at 482.

308. *Id.* at 483.

309. *Id.*

310. *Id.*

311. *Id.* at 485.

312. *Id.*

313. *Id.* at 486.

314. *Id.*

315. *Id.*

316. 825 N.E.2d 384 (Ind. Ct. App.), *reh’g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 180 (Ind. 2005).

317. *Id.* at 388

searched the truck as part of the procedure for impounding it. This procedure included searching closed containers in the truck, and that search yielded equipment and materials used to manufacture methamphetamine. Although most of the analysis in this case applies the Fourth Amendment, the court of appeals briefly discussed section 11 and found the search reasonable.³¹⁸ Materials used in the manufacture of methamphetamine were visible in the truck's bed, so under section 11 police were justified in searching it immediately because of the "volatile and dangerous nature" of various methamphetamine precursors.³¹⁹

The defendant in *Best v. State*³²⁰ was involved in an auto accident, and investigating officers discovered that there was an outstanding warrant for Best from another county.³²¹ In arresting Best, police discovered a gun in his car that led to his conviction for carrying a handgun without a license.³²² Best challenged the arrest because the warrant was old—he had been arrested on the warrant three previous times, and each time the county issuing the warrant had taken no action to obtain custody of Best.³²³ The court ruled that when Best was detained under the warrant for the first time and no action was taken to enforce the warrant, it "was satisfied and therefore lost its validity as a proper basis for future arrests."³²⁴ The arrest based on an invalid warrant was itself invalid, so the handgun found in the search of Best's car had to be suppressed, and his conviction was reversed.³²⁵

The Indiana Court of Appeals had two occasions during the survey period to apply *Pirtle v. State*,³²⁶ which gives an individual in police custody the right to consult with counsel before consenting to a search.³²⁷ In *Polk v. State*,³²⁸ the defendant was a passenger in a car pulled over for a traffic violation, and police asked for permission to search his "fanny pack."³²⁹ The court ruled that under the circumstances, including the fact that Polk was not placed in handcuffs and was not told that he was under arrest or that he could not leave the scene, he was not in custody for *Pirtle* purposes and therefore had no right to consult with counsel before giving permission for the search.³³⁰ In *Schmidt v. State*,³³¹ the court ruled that *Pirtle* does not apply to situations in which an officer asks an individual to

318. *Id.* at 391.

319. *Id.*

320. 817 N.E.2d 685 (Ind. Ct. App. 2004).

321. *Id.* at 686.

322. *Id.*

323. *Id.* at 686-87.

324. *Id.* at 689.

325. *Id.*

326. 323 N.E.2d 634 (Ind. 1975).

327. *Id.* at 640.

328. 822 N.E.2d 239 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 743 (Ind. 2005).

329. *Id.* at 242-43.

330. *Id.* at 249-50.

331. 816 N.E.2d 925 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 743 (Ind. 2005).

submit to a chemical breath test.³³² The court premised this conclusion on the statutory requirement that an officer must have probable cause to believe that an individual has committed an alcohol-related driving offense before administering a chemical breath test.³³³ Because *Pirtle* was intended as a safeguard against an individual's allowing a general search when there may be no probable cause, its purpose is not served in a situation where probable cause already has been established and the search is narrow rather than general.³³⁴

Finally, the court handled two cases applying section 11 in the context of police roadblocks. *Sublett v. State*³³⁵ involved an arrest arising from a drunk driving roadblock.³³⁶ Police set up a roadblock in an area of frequent drunk driving arrests, and the roadblock was marked with a sign in a location allowing drivers to avoid the roadblock.³³⁷ Drivers were stopped randomly, and each was required to produce registration and identification, giving officers an opportunity to converse with drivers and observe signs of intoxication.³³⁸ *Sublett* could not produce a license because his driving privileges had been suspended for life, and he was convicted of driving after his license had been suspended.³³⁹ The court examined the roadblock against the guideposts established by *State v. Gerschoffer*,³⁴⁰ in which the Indiana Supreme Court applied section 11 to drunk driving roadblocks.³⁴¹ The court of appeals concluded that *Gerschoffer* set forth "factors to be weighed and considered, not required elements" for analyzing the reasonableness of roadblocks under section 11.³⁴² The court concluded that the roadblock was adequately marked.³⁴³

Also, despite *Gerschoffer*'s statement that a citizen should not be "compelled to show his papers" in order to drive,³⁴⁴ the court validated the police practice of asking drivers for identification and registration as an opportunity for police to detect signs of intoxication in this situation, so long as the roadblock was established at a location and time where drunk driving was common.³⁴⁵

Given this lack of discretion [as to which motorists would be stopped], and the scripted, consistent manner in which the police officers conducted themselves, we are unable to say that the practice of

332. *Id.* at 943.

333. *Id.* at 943-44.

334. *Id.* at 944.

335. 815 N.E.2d 1031 (Ind. Ct. App. 2004).

336. *Id.* at 1033.

337. *Id.* at 1032-33.

338. *Id.* at 1033.

339. *Id.* at 1033-34.

340. 763 N.E.2d 960 (Ind. 2002).

341. *Id.* at 965-66.

342. *Sublett*, 815 N.E.2d at 1036.

343. *Id.* at 1037.

344. *Gerschoffer*, 763 N.E.2d at 968 (internal quotation omitted).

345. *Sublett*, 815 N.E.2d at 1038.

requesting the driver's license and vehicle registration of the stopped motorists was so intrusive and unrelated to the objective of the checkpoint as to render the checkpoint constitutionally unreasonable.³⁴⁶

Finding the checkpoint's procedures reasonable, the court affirmed Sublett's conviction.³⁴⁷

In *Howard v. State*,³⁴⁸ the defendant was pulled over at a seat-belt checkpoint designed so that one officer observed passing cars, then radioed another officer further ahead who pulled over cars in which the first officer observed that the driver was not wearing a seat-belt.³⁴⁹ The officer who spoke to Howard determined that he gave a false name and that his license was suspended, and the officers found methamphetamine in an inventory search.³⁵⁰ Howard's challenge to the stop was rejected, as the court reasoned that *Gerschoffer's* criteria did not apply because the first officer's observation that a driver was not wearing a seat-belt constituted probable cause for a stop.³⁵¹

D. Double Jeopardy

As with searches, the Indiana Court of Appeals decided a number of cases requiring application and development of the law under article I, sec. 14, the Double Jeopardy Clause of the Indiana Constitution. The Indiana Supreme Court previously clarified that the standard for double jeopardy in the multiple punishments context is different under the Indiana Constitution than the Federal Constitution in a 1999 case, *Richardson v. State*.³⁵² Indiana's analysis is bifurcated. First, a court determines whether any offense of which the defendant has been convicted has the same elements as another offense of which he has been convicted, and if it does there is a violation (this test appears to be identical to the federal test for multiple punishment double jeopardy described in *Blockburger v. United States*³⁵³). Second, the court examines whether the evidence used to convict a defendant of one offense is identical to the evidence used to convict the defendant of another crime, and if it is there is a violation of the Double Jeopardy Clause.³⁵⁴ The second step has no federal analogue. Lower courts also refer to Justice Sullivan's concurrence in *Richardson*, where he spells out five more specific tests (concededly applying both constitutional and common-law principles) for double jeopardy.³⁵⁵

346. *Id.*

347. *Id.* at 1039.

348. 818 N.E.2d 469 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d (Ind. 2005).

349. *Id.* at 472.

350. *Id.* at 473.

351. *Id.* at 474-75.

352. 717 N.E.2d 32 (Ind. 1999).

353. 284 U.S. 299 (1932).

354. *Richardson*, 717 N.E.2d at 50-54.

355. *Id.* at 55-57 (Sullivan, J., concurring). Some of the specific tests in Justice Sullivan's taxonomy involve common law, not just constitutional principles. *See, e.g.,* *Gross v. State*, 769

Indiana's analysis is illustrated by *Caron v. State*,³⁵⁶ in which the defendant was convicted of possession of methamphetamine in excess of three grams and manufacturing methamphetamine in excess of three grams.³⁵⁷ The State proved the possession offense by introducing evidence that the defendant constructively possessed methamphetamine.³⁵⁸ The State proved the manufacturing conviction with the same methamphetamine along with apparatus used for manufacture.³⁵⁹ Because the only evidence used for the first conviction was exactly the same as evidence used for the second, there was a double-jeopardy violation and the court ordered that the lesser conviction be vacated.³⁶⁰ The court noted that if the State had more clearly segregated the evidence, so that some was clearly used to prove one offense and different evidence was used to prove the other, there might be no violation.³⁶¹

In a similar case, *Jarrell v. State*,³⁶² the court found a double-jeopardy violation for convictions of possession of a firearm by a serious violent felon and carrying a handgun without a license.³⁶³ Each of these crimes has at least one element different than the other, so the convictions passed the federal double-jeopardy test and the first step of Indiana's test.³⁶⁴ To prove the first offense, the State had to show that Jarrell possessed the gun and had certain past convictions.³⁶⁵ To prove the second, the State had only to show that Jarrell possessed the firearm because Jarrell had the burden to prove the affirmative defense that he had a license.³⁶⁶ Thus, the only evidence to prove the second charge was exactly the same as evidence used to prove the first charge, violating the Double Jeopardy Clause and requiring that one conviction be vacated.³⁶⁷

*Holden v. State*³⁶⁸ required double-jeopardy analysis of convictions for two counts of robbery and two counts of conspiracy to commit robbery. Holden argued that the jury likely relied on the evidence of the robbery itself to prove the overt act element required to show the conspiracy.³⁶⁹ The court reviewed the trial court's instructions and the charging instruments.³⁷⁰ The court noted that "significant and detailed facts [were] presented to the jury with regard to all of

N.E.2d 1136, 1139 (Ind. 2002) (acknowledging common law aspect of double-jeopardy analysis).

356. 824 N.E.2d 745 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 747 (Ind. 2005).

357. *Id.* at 748.

358. *Id.* at 749, 753.

359. *Id.*

360. *Id.* at 754.

361. *Id.* at 754 n.6.

362. 818 N.E.2d 88 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 737 (Ind. 2005).

363. *Id.* at 93.

364. *Id.* at 92-93.

365. *Id.* (citing IND. CODE § 35-47-4-5(c) (2001)).

366. *Id.*

367. *Id.* at 93.

368. 815 N.E.2d 1049 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 733 (Ind. 2005).

369. *Id.* at 1055.

370. *Id.* at 1055-57.

the events constituting the planning of the robberies.”³⁷¹ Instead, “the jury was instructed to focus upon the actual events of the robbery as the overt act of the conspiracy.”³⁷² The court therefore concluded “that there is a reasonable possibility that the jury relied upon the same facts—that Holden provided the handgun and waited for one of the cohorts to commit the robbery—for both the robbery and conspiracy to commit robbery convictions.”³⁷³ The court found a double-jeopardy violation and vacated the conspiracy convictions.³⁷⁴

The Indiana Court of Appeals came to a different conclusion regarding the conspiracy conviction in *Waldon v. State*.³⁷⁵ The defendant was convicted of multiple crimes including burglary and conspiracy to commit burglary.³⁷⁶ Unlike *Holden*, however, the charging instruments and the State’s argument clarified that meetings among the conspirators, not the crime itself, were the overt acts proving the conspiracy.³⁷⁷ “The jury did not have to rely upon any actual evidence of the breaking and entering of any businesses to find Waldon guilty of conspiracy,” so the convictions did not violate double-jeopardy principles.³⁷⁸

Similarly, the court looked at convictions for battery and resisting law enforcement in *Ankney v. State*.³⁷⁹ Ankney injured three officers in an attempt to escape from custody.³⁸⁰ He was charged with battery for injuring the three officers.³⁸¹ The resisting law enforcement charge also alleged that he forcibly resisted the three officers, injuring them.³⁸² The court therefore found that “there is a reasonable possibility that the jury used the same evidence to convict Ankney of resisting law enforcement and each of the batteries.”³⁸³ The court therefore ordered that the resisting conviction be vacated as a double-jeopardy violation.³⁸⁴

E. Section 13 Impartial Jury Clause

The Indiana Court of Appeals addressed the right to impartial jury arising from article I, section 13 in *Black v. State*.³⁸⁵ Black was convicted of murder

371. *Id.* at 1058.

372. *Id.*

373. *Id.*

374. *Id.* at 1058-59.

375. 829 N.E.2d 168 (Ind. Ct. App.), *reh’g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 191 (Ind. 2005).

376. *Id.* at 172.

377. *Id.* at 180-81.

378. *Id.* at 181.

379. 825 N.E.2d 965 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 175 (Ind. 2005).

380. *Id.* at 968.

381. *Id.* at 972.

382. *Id.*

383. *Id.*

384. *Id.*

385. 829 N.E.2d 607 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 185 (Ind. 2005).

despite his defense of self-defense.³⁸⁶ During pre-trial hearings, the trial court granted the State's motion precluding any mention of self-defense "until such time as that defense is raised, either by the testimony of the defendant or any statements."³⁸⁷ The court of appeals agreed with Black's argument that the trial court's order precluding him from questioning prospective jurors about self-defense denied him a fair trial.³⁸⁸ "[T]he ability to question prospective jurors regarding their beliefs and feelings concerning the doctrine of self-defense, so as to determine whether they have firmly-held beliefs which would prevent them from applying the law of self-defense to the facts of the case, is essential to a fair and impartial jury."³⁸⁹ This error, tied explicitly to "the right to a fair and impartial jury provided by Article 1, Section 13 of the Indiana Constitution,"³⁹⁰ caused reversal and remand for a new trial.³⁹¹

F. Taxation

The Indiana Supreme Court analyzed the property tax uniformity clause, article X, § 10, in *Department of Local Government Finance v. Commonwealth Edison Co. of Indiana*.³⁹² Edison sought an adjustment to its 1995 property tax assessment, claiming it was entitled to equalization because county assessment officials valued its property artificially high in comparison to residential and commercial property in the county.³⁹³ It sought to prove its case by showing that its property was assessed at a much higher proportion of its market value than was residential or commercial property.³⁹⁴

The court first addressed whether Edison was entitled to equalization relief based on applicable statutes and constitutional principles.³⁹⁵ It concluded that Edison was entitled to such relief if it could show "that its property taxes were higher than they would have been had other property been properly assessed."³⁹⁶ The court rejected the State's argument, based on language in *State Board of Tax Commissioners v. Town of St. John*,³⁹⁷ that no taxpayer has a constitutional right to a perfectly uniform assessment.³⁹⁸ That language notwithstanding, the court stated, Indiana's statutes and administrative rules provide processes for obtaining relief from an assessment that is too high because of unequal assessing

386. *Id.* at 609.

387. *Id.*

388. *Id.* at 611.

389. *Id.*

390. *Id.* at 610.

391. *Id.* at 612.

392. 820 N.E.2d 1222 (Ind.), *reh'g denied* (Ind. 2005).

393. *Id.* at 1225.

394. *Id.* at 1228.

395. *Id.* at 1225-28.

396. *Id.* at 1226.

397. 702 N.E.2d 1034, 1043 (Ind. 1998).

398. *Commonwealth Edison Co.*, 820 N.E.2d at 1227.

practices.³⁹⁹ The court nevertheless rejected Edison's substantive claim, holding that because market value was not the standard for value at the time in question, Edison could not prove inequality through its evidence comparing its assessment-to-market-value ratio with the same ratio for other classes of property.⁴⁰⁰ Rather, Edison could prove its entitlement to equalization only by showing that assessors failed to properly apply the valuation standards then in effect.⁴⁰¹

A hospital challenged the denial of a property tax exemption for its fitness facility in *Indianapolis Osteopathic Hospital, Inc. v. Department of Local Government Finance*.⁴⁰² The hospital itself was exempt, and it sought to extend the exemption to the fitness facility, which contained tennis courts, a basketball court, a track, weight training and other facilities.⁴⁰³ Individuals could join the fitness facility for a fee, and fee-paying members accounted for fifty-nine percent of the facility's use.⁴⁰⁴ The remaining use was by hospital patients for rehabilitation and for other purposes, including community use. The Tax Court adopted a broad construction of "charitable purpose" for property tax exemption purposes: "'Charity,' as used in Indiana's property tax exemption statutes, is favored with the broadest constitutional definition allowable" shown by "evidence of relief of human want."⁴⁰⁵ It concluded, however, that "the promotion of health through physical activity" was not a charitable purpose; therefore, the fitness facility did not qualify for the exemption.⁴⁰⁶ The Tax Court also rejected the hospital's argument, based on article I, § 23, that its fitness facility was treated differently than another fitness facility in the same area that had been given an exemption.⁴⁰⁷ The court concluded that the other facility was fundamentally different because it contained many other features and facilities, and the hospital had failed to prove that the similarities between the facilities required identical tax treatment.⁴⁰⁸

399. *Id.* at 1226.

400. *Id.* at 1230.

401. *Id.* The *Town of St. John* litigation, of course, mandated a new statewide assessment based on market-oriented valuation principles. *Town of St. John*, 702 N.E.2d at 1041. In effect, the Indiana Supreme Court held that Edison could not obtain relief for bad assessments under the old, pre-*Town of St. John* standard, even though *Town of St. John* held that the very problem for which Edison sought individual relief did exist, violated the Indiana Constitution, and required the remedy of a new assessment based on objective standards. See *Commonwealth Edison Co.*, 820 N.E.2d at 1231. The only taxpayers who received the relief Edison sought were the named plaintiffs in the *Town of St. John* litigation.

402. 818 N.E.2d 1009 (Ind. Tax Ct. 2004), *trans. denied*, 831 N.E.2d 744 (Ind. 2005).

403. *Id.* at 1011-12.

404. *Id.* at 1012.

405. *Id.* at 1014-15 (quoting *Indianapolis Elks Bldg. Corp. v. State Bd. of Tax Comm'rs*, 251 N.E.2d 673, 682 (Ind. App. 1969)).

406. *Id.* at 1017-18. Because the facility was not used for a charitable purpose, the court did not address "predominant use." *Id.* at 1018 n.12.

407. *Id.* at 1020-21.

408. *Id.*

The Tax Court also rejected a uniformity argument relating to riverboats used for gaming in *Majestic Star Casino, LLC v. Blumenburg*.⁴⁰⁹ Under the requirement of uniform and equal taxation in article X, § 1, the riverboat challenged the statutory requirement that riverboats used for gaming be taxed as real property whereas other commercial watercraft are taxed based on tonnage.⁴¹⁰ The court noted that “[b]y taxing riverboats as real property and commercial vessels as something else, the Indiana legislature has created a statutory classification based upon whether gambling occurs on the vessel.”⁴¹¹ The court concluded that this different treatment does not violate the Indiana Constitution because it is legitimate for the legislature to treat property with similar physical characteristics differently based on its use.⁴¹² Moreover, the gambling boats placed particular burdens on local governments that could properly be compensated by property taxes.⁴¹³ The court therefore found that the different treatment did not violate the uniformity and equality provisions of article X, § 1.⁴¹⁴

G. Jury Trial

In *Cunningham v. State*,⁴¹⁵ the Indiana Court of Appeals ruled that article I, section 20 gave a defendant a right to a jury trial for a speeding ticket.⁴¹⁶ The constitutional provision states that “[i]n all civil cases, the right of trial by jury shall remain inviolate.”⁴¹⁷ Indiana’s courts have long interpreted this provision to provide the right to a jury trial “in actions where the right existed at common law.”⁴¹⁸ Reviewing the history of traffic tickets, the court noted that before 1981, traffic offenses were criminal.⁴¹⁹ But the General Assembly passed a statute effective September 1, 1981, converting traffic offenses to the status of infractions governed by the Rules of Civil Procedure.⁴²⁰ The court stated that “[o]ur legislature removed the protections afforded to criminal defendants when it decided that the Indiana Rules of Trial Procedure govern infractions and, in doing so, directed that we now treat infractions as civil matters,” governed by

409. 817 N.E.2d 322 (Ind. Tax Ct. 2004).

410. *Id.* at 325.

411. *Id.* at 326.

412. *Id.* at 327-28.

413. *Id.* at 327.

414. *Id.* at 328.

415. 835 N.E.2d 1075 (Ind. Ct. App. 2005), *trans. denied* (Ind. 2006).

416. *Id.* at 1079.

417. IND. CONST. art. I, § 20; *Cunningham*, 835 N.E.2d at 1076.

418. *Cunningham*, 835 N.E.2d at 1077 (citing *Songer v. Civitas Bank*, 771 N.E.2d 61, 63 (Ind. 2002)).

419. *Id.* at 1078.

420. *Id.* at 1076-77 (citing IND. CODE § 34-4-21-1 (now § 34-28-5-1); *Wirgau v. State*, 443 N.E.2d 327, 329 n.1 (Ind. Ct. App. 1982)).

section 20.⁴²¹

History governs whether there is a jury trial right when analyzing causes of action that existed in 1852.⁴²² But historical analysis is unhelpful in this context “because the earliest versions of today’s speed zone statutes were not codified until 1939.”⁴²³ When such situations arise, the right to jury trial is determined by whether the action is fundamentally equitable (and therefor not jury triable) or legal (and jury triable).⁴²⁴ The court determined that “from the time of their inception until 1981, when . . . the Indiana Rules of Trial Procedure began to govern the enforcement of infraction violations, such offenses were criminal actions and, as such, were not equitable in nature.”⁴²⁵ Because criminal actions for traffic violations were fundamentally legal in nature, their current descendent, the “quasi-criminal” traffic infraction, are also legal and therefore triable to juries.⁴²⁶

The court of appeals also examined the jury’s role under article I, section 19 in *Gantt v. State*,⁴²⁷ a child molesting case. During deliberation, the jury presented the trial court with this question: “[t]here is a disagreement as to whether you must believe one witness or the other. Can you reach a verdict if you don’t believe either party?”⁴²⁸ The trial court gave a lengthy answer, ending: “[y]ou must decide which witnesses you will believe and which you will disbelieve.”⁴²⁹ This response was incorrect and usurped the jury’s role under section 19 to judge the facts and the law, indicating that the jury is the sole judge of credibility.⁴³⁰ The instruction invaded the jury’s province by indicating that the jury had to believe one of two conflicting witnesses, when in fact the jury could choose to believe neither.⁴³¹ Finding this error was not harmless, the court reversed the verdict.⁴³²

H. Jury Role in Sentencing

The Indiana Supreme Court provided further explanation of the jury’s role in sentencing in *Smith v. State*,⁴³³ which addressed the Repeat Sexual Offender Statute.⁴³⁴ When Smith was convicted of his third unrelated rape, he was subject

421. *Id.* at 1077.

422. *Id.* at 1078.

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.* at 1078-79.

427. 825 N.E.2d 874 (Ind. Ct. App. 2005).

428. *Id.* at 875.

429. *Id.* at 877-78.

430. *Id.* at 878.

431. *Id.*

432. *Id.* at 879.

433. 825 N.E.2d 783 (Ind. 2005).

434. IND. CODE § 35-50-2-14 (2005).

to a sentence enhancement under the Repeat Sexual Offender Statute.⁴³⁵ The statute allowed the court to examine an offender's criminal record and determine whether the offender satisfied the elements of the statute.⁴³⁶ Smith challenged this sentencing methodology, arguing that article I, section 19's provision that in criminal cases, "the jury shall have the right to determine the law and the facts"⁴³⁷ meant that the jury had to adjudicate the sentencing enhancement.⁴³⁸ In an earlier case, *Seay v. State*,⁴³⁹ the Indiana Supreme Court had ruled that the jury, not a judge, had to determine whether a defendant satisfied the conditions of the habitual offender statute.⁴⁴⁰

In *Smith*, the court explained that the Constitution does not require a jury determination that an individual satisfies the prerequisites for a sentencing enhancement.⁴⁴¹ The basis for the holding in *Seay* was particular statutory language committing the habitual offender determination to the jury.⁴⁴² In contrast, the Repeat Sexual Offender Statute explicitly stated that the judge was to determine whether the statutory prerequisites for sentencing enhancement existed.⁴⁴³ The court ruled that nothing in section 19 precluded the assignment of this sentencing task to the judge.⁴⁴⁴ The court explicitly declined to say whether the right to jury trial in section 13 included jury sentencing, a claim Smith did not raise.⁴⁴⁵

I. Damages for Constitutional Violations

Federal and state courts in Indiana have grappled with whether parties may pursue actions for damages for violations of the Indiana Constitution, and the Indiana Supreme Court has accepted a certified question from a federal court on that issue that was undecided at the time this article was written.⁴⁴⁶ The Indiana

435. *Smith*, 825 N.E.2d at 784.

436. *Id.*

437. IND. CONST. art. I, § 19.

438. *Smith*, 825 N.E.2d at 784.

439. 698 N.E.2d 732 (Ind. 1998).

440. *Id.* at 737.

441. *Smith*, 825 N.E.2d at 786.

442. *Seay*, 698 N.E.2d at 733-34 (citing IND. CODE 35-50-2-8(d) (Supp. 1982)). Because the statute committed the decision to the jury, article I, section 19 permitted the jury to find that the prerequisites to an enhanced sentence existed but still to decline to impose the enhancement. *Id.* at 737.

443. *Smith*, 825 N.E.2d at 786.

444. *Id.* This holding is not affected by *United States v. Booker*, which applied the Sixth Amendment to require jury determinations of most factual predicates for sentencing enhancements. 545 U.S. 220 (2005). *Booker* allows enhancements based on past convictions to be given by judges without jury involvement. *Id.* at 233-34.

445. *Smith*, 825 N.E.2d at 787.

446. See *Cantrell v. Morris*, No. 2:04-CV-364 (N.D. Ind. Sept. 14, 2005) (order denying Motion to Stay Proceedings), 2005 WL 2240074 (slip copy).

Court of Appeals looked at a procedural issue relating to damage actions under the Indiana Constitution in *Irwin Mortgage Corp. v. Marion County Treasurer*.⁴⁴⁷ In this case, a bank alleged that penalties the county assessed to the bank's mortgagees for late tax payments were unconstitutional.⁴⁴⁸ The bank sought a refund of the penalties.⁴⁴⁹

The court of appeals affirmed the trial court's dismissal of the damages claim because the bank had not filed a notice of tort claim under the Indiana Tort Claims Act.⁴⁵⁰ There was no dispute that the bank had failed to give the local authorities the notice required by the statute within the prescribed time (in part because the bank had pursued administrative remedies that were ultimately fruitless).⁴⁵¹ The bank argued that its claims did not sound in tort, but the court rejected that view.⁴⁵² Because the claim was for tort damages, the court ruled, the bank was required to provide notice as required by the tort claims act, and its failure to substantially comply was fatal to its claim for damages under the Indiana Constitution.⁴⁵³

This decision is notable because it assumes that a party seeking damages under the Indiana Constitution is entitled to pursue its claims under the tort claims act. It is not a holding on the question because the procedural issue precluded the court from reaching the ultimate issue of entitlement to damages. Nevertheless, it is one more relevant precedent on the issue of damages remedies under the Indiana Constitution.

J. Due Course of Law

The court of appeals invoked article I, section 12 against prosecutorial vindictiveness in *Owens v. State*.⁴⁵⁴ Owens was convicted of dealing in cocaine, but his conviction was reversed in part on appeal and remanded for new trial.⁴⁵⁵ On remand, the prosecuting attorney sought to amend the charges to a higher level felony, and Owens appealed the trial court's grant of that motion on an interlocutory basis.⁴⁵⁶ The court indicated that article I, section 12 "prohibit[s] prosecutorial vindictiveness."⁴⁵⁷ The court cited precedents indicating that increased charges on remand raise a presumption of prosecutorial

447. 816 N.E.2d 439, 440 (Ind. Ct. App. 2004).

448. *Id.* at 441.

449. *Id.*

450. *Id.* at 447.

451. *Id.*

452. *Id.* at 446.

453. *Id.* at 447. The bank also sought damages for violation of its federal civil rights under 42 U.S.C. § 1983 (2000), which has no notice requirement. The court reinstated the bank's claim for damages under § 1983. *Id.* at 448.

454. 822 N.E.2d 1075 (Ind. Ct. App. 2005).

455. *Id.* at 1076.

456. *Id.*

457. *Id.* at 1077.

vindictiveness.⁴⁵⁸ The prosecutor admitted that there was no new evidence on which to base the increased charge and that the charge was increased because Owens did not accept a plea bargain.⁴⁵⁹ These facts did not overcome the presumption of prosecutorial vindictiveness, and the court of appeals reversed the trial court's order allowing the increased charges.⁴⁶⁰

K. Death Penalty

In *Corcoran v. State*,⁴⁶¹ the supreme court looked at whether a deadline limiting capital defendants' time to file post-conviction proceedings violated article I, section 23. Corcoran had initially refused to seek post-conviction relief, then changed his mind, but his petition was barred by the time limit for filing post-conviction petitions in capital cases of thirty days after direct review is completed.⁴⁶² Corcoran alleged that the time limit on capital post-conviction filings violated section 23 because no time limit exists for post-conviction petitions in non-capital cases.⁴⁶³ The court stated that the claim "does not require extended treatment" and that "a separate set of procedural requirements for the collateral review of the convictions and sentences of capital and non-capital litigants easily meets the rational basis and reasonableness requirements necessary to pass . . . state Equal Privileges and Immunities Clause muster."⁴⁶⁴ In another capital case, *Baird v. State*,⁴⁶⁵ the court ruled that Baird's claim that the Cruel and Unusual Punishments Clause of article I, section 16 does not bar the execution of individuals with serious mental illness.⁴⁶⁶ The court held that because Indiana law permits a jury to find a defendant guilty but mentally ill and mental illness can be considered in sentencing, Indiana law gives sufficient consideration to mental illness in capital cases.⁴⁶⁷

L. Free Expression

The court of appeals applied the holding in *Price v. State*⁴⁶⁸ to reverse a juvenile adjudication in *Matter of U.M.*⁴⁶⁹ U.M. was one of a group of juveniles

458. *Id.*

459. *Id.*

460. *Id.* at 1078.

461. 827 N.E.2d 542 (Ind. 2005).

462. *Id.* at 543.

463. *Id.* at 546.

464. *Id.*

465. 831 N.E.2d 109 (Ind.), *cert denied*, 126 S. Ct. 312 (2005).

466. *Id.* at 116.

467. *Id.* Baird's sentence was eventually commuted to life without parole by the Governor. Executive Order 05-23, available at http://www.in.gov/gov/media/eo/eo_05_23_clemency_Arthur_Baird_II.pdf.

468. 622 N.E.2d 954, 967 (Ind. 1993).

469. 827 N.E.2d 1190 (Ind. Ct. App. 2005).

arrested for spray-painting graffiti.⁴⁷⁰ While in the police car, one of the group did not hold up his hands as instructed by police.⁴⁷¹ U.M. yelled at an officer that the other juvenile was unable to hold his arms up because they hurt. He added profanity to his statement, and he continued making derogatory statements about the police relating to his pained comrade for several minutes. U.M. was charged with disorderly conduct for his statements.⁴⁷² As in *Price*, the court concluded that U.M.'s statements were political in nature because they embodied criticism of police, however crudely expressed.⁴⁷³ Under *Price*, the statements therefore could not be punished unless they were shown to harm identifiable individuals.⁴⁷⁴ Because the State produced no proof of such harm, the court vacated the juvenile adjudication.⁴⁷⁵

Also applying section 9, the court of appeals analyzed landlords' claims for an injunction against leafleting in *Aberdeen Apartments. v. Cary Campbell Realty Alliance, Inc.*⁴⁷⁶ The realtor sought to market new homes by dropping copies of its publications on the doorsteps of apartments owned by the landlords. The landlords sought an injunction, arguing that the realtor was trespassing. The realtor countered that it was exercising its right to free expression by distributing information, some of which was in newspaper form. The court of appeals rejected the realtor's argument that an injunction would constitute unconstitutional prior restraint on speech.⁴⁷⁷ An injunction would not preclude distribution of the information, only trespass on the apartments' land to do so; the realtor had other methods to disseminate the information, including mail or leaving it to be picked up as a free publication in various locations.⁴⁷⁸ The court of appeals ruled that the trial court abused its discretion in denying a preliminary injunction.⁴⁷⁹

M. Impairment of Contract

SCI Indiana Funeral Services, Inc. v. D.O. McComb & Sons, Inc.,⁴⁸⁰ analyzed the relationship between a cemetery operator (SCI) and funeral home (McComb) and the constitutionality of the Exclusive Rights Act, a statute enacted in 1997

470. *Id.* at 1191.

471. *Id.*

472. *Id.* at 1192.

473. *Id.* at 1193.

474. *Id.*

475. *Id.*

476. 820 N.E.2d 158, 161 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 178 (Ind. 2005).

477. *Id.* at 168.

478. *Id.* at 169.

479. *Id.* at 170. Judge Baker dissented, concluding that an injunction would be an impermissible prior restraint under both the Indiana and Federal Constitutions. *Id.* at 172 (Baker, J., dissenting).

480. 820 N.E.2d 700 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 748 (Ind. 2005).

to give cemetery owners the exclusive right to open and enter the graves in their cemeteries.⁴⁸¹ SCI's predecessor and McComb contracted before the law was passed to allow McComb to sell, open, and close the graves at the cemetery.⁴⁸² When SCI acquired the cemetery after the law was passed, it stated that it would not honor the contract, and McComb sued.⁴⁸³ In the lawsuit, McComb challenged the Exclusive Rights Act as an unconstitutional impairment of its contract.⁴⁸⁴ The court of appeals ruled that the act is reasonably necessary to protect the health, safety and welfare of the general public and therefore is not an unconstitutional contract impairment.⁴⁸⁵ The trial court had ruled that the statute did not protect the "general public," but only protected those citizens with family members buried in SCI's cemetery, so that the statute fell outside the State's police power.⁴⁸⁶ The court of appeals disagreed, concluding that the statute seeks to limit problems affecting the general public such as damage to existing gravesites and that the statute therefore does not constitute an unlawful contract impairment.⁴⁸⁷

481. *Id.* at 703 (citing IND. CODE § 23-14-46-7 (2005)).

482. *Id.* at 702.

483. *Id.* at 703.

484. *Id.* at 709.

485. *Id.* at 710.

486. *Id.*

487. *Id.*

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

JOEL M. SCHUMM*

Indiana's appellate courts issued hundreds of opinions addressing issues of criminal law and procedure during the survey period October 1, 2004, to September 30, 2005. The General Assembly enacted legislation that largely responded to court opinions, and two Governors granted clemency to death row inmates. This article seeks to address the most significant developments in the courts, legislature, and even the Governor's office—the ones that broke new ground, resolved conflicts, or created concerns that are likely to require resolution or reconsideration in the future.

I. SEARCH & SEIZURE

Claims of unreasonable search and seizure under either the Fourth Amendment or its more generous analog—article I, section 11 of the Indiana Constitution—are among the most frequently litigated issues in criminal cases. During the survey period, the Indiana Supreme Court resolved the confusion surrounding searches of garbage left for collection, and the Indiana Court of Appeals took a tough stand against strip searches filmed for television.

A. *Searches of Garbage*

The Indiana Supreme Court resolved a split among panels of the court of appeals regarding searches of garbage left outside of a home in *Litchfield v. State*.¹ The Fourth Amendment permits the warrantless search of garbage left at the curb for pickup because the defendant does not have a “reasonable expectation of privacy” in garbage that is easily accessible to the public.² Article I, section 11 of the Indiana Constitution, however, provides a different methodology for searches, considering whether a police officer's conduct was reasonable under the “totality of the circumstances.”³ Synthesizing many of its recent cases, the Indiana Supreme Court explained that the reasonableness of a search or seizure under section 11 turns on the balancing of three factors: “1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of search or seizure imposes on citizen's ordinary activities, and 3) the extent of law enforcement needs.”⁴

Reviewing its own precedent, the court acknowledged its discomfort with unbridled searches of garbage by police. Although the court had upheld a search of garbage a decade earlier in a case in which officers conducted themselves in

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1. 824 N.E.2d 356 (Ind. 2005).

2. See *California v. Greenwood*, 486 U.S. 35, 41 (1988).

3. *Litchfield*, 824 N.E.2d at 359.

4. *Id.* at 361.

a manner similar to trash collectors, it also noted that “Hoosiers are not entirely comfortable with the idea of police officers casually rummaging through trash left at curbside.”⁵

The spate of court of appeals cases in recent years employed a variety of approaches, which is not surprising in light of the fairly nebulous standard of section 11. For example, in *State v. Stamper*,⁶ the court of appeals held a search unreasonable when the police officer entered the defendant’s property and seized the trash from a pile near a “No Trespassing” sign. The Indiana Supreme Court took issue with the approach of *Stamper* and more recent cases, reasoning that police entry upon property is not the proper focus: “Property lines are wholly irrelevant to the degree of suspicion of a violation or the need for enforcement and largely irrelevant to the degree of intrusion inflicted by the search or seizure.”⁷ But section 11 does impose limitations on police, as “it is not reasonable for law enforcement to search indiscriminately through people’s trash.”⁸ The court concluded that police must not only retrieve trash in a manner substantially similar to trash collectors, but they must also have “articulable individualized suspicion” of criminal activity to ensure they are not merely going on fishing expeditions.⁹ Because the issue of reasonable suspicion was not resolved at the trial court level, the supreme court remanded the case.¹⁰

Litchfield is significant not only because it resolved the considerable conflicts between court of appeals panels on the subject of searches of trash but also because it provides specific guidance to lower courts when reviewing challenge under section 11. The three factor approach for determining reasonableness and the requirement of individualized suspicion will likely lead to greater consistency than the far broader “reasonableness of police conduct” standard that, in the context of trash searches alone, led to disparate results when applied by different judges.

Just a few months after *Litchfield* was decided, the court of appeals easily applied the *Litchfield* approach to another trash search. In *Crook v. State*,¹¹ police collected trash bags without a warrant after an anonymous caller alerted them of illegal drug activity. The court began with *Litchfield*’s benchmark requirement of “articulable individualized suspicion,” which is the same requirement for an investigatory automobile stop.¹² An anonymous tip alone does not generally create reasonable articulable suspicion, and the State’s evidence in *Crook* pointed to nothing else.¹³ Therefore, the search of the trash violated section 11, and the

5. *Id.* (quoting *Moran v. State*, 644 N.E.2d 536, 541 (Ind. 1994)).

6. 788 N.E.2d 862 (Ind. Ct. App. 2003).

7. *Litchfield*, 824 N.E.2d at 362-63.

8. *Id.* at 363.

9. *Id.* at 364.

10. *Id.*

11. 827 N.E.2d 643 (Ind. Ct. App. 2005).

12. *Id.* at 646 (citing *Litchfield*, 824 N.E.2d at 364). *See generally* *Terry v. Ohio*, 392 U.S. 1, 19-22 (1968).

13. *Crook*, 827 N.E.2d at 846.

trial court erred in denying Crook's motion to suppress.¹⁴

In *Edwards v. State*,¹⁵ the court of appeals again applied *Litchfield* in addressing a different scenario: police use of evidence found in a warrantless trash search to obtain a warrant for the search of a home. The court first concluded that the tip received from a confidential informant did not suggest that Edwards, the resident of the home, was going to commit a "specific, impending crime," and it did not provide information that could be corroborated by police.¹⁶ Most importantly, the credibility of the confidential informant was never established.¹⁷ Therefore, the reasonable suspicion requirement was not met.

Although the tip did not establish reasonable articulable suspicion for the trash search as required by *Litchfield*,¹⁸ the court went on to determine if the evidence was obtained in good faith. Indiana Code section 35-37-4-5 prohibits the exclusion of evidence unlawfully obtained if the law enforcement officer obtained the evidence in good faith.¹⁹ Evidence is obtained in good faith if "obtained pursuant to a state statute, judicial precedent, or court rule that is later declared unconstitutional or otherwise invalidated."²⁰ Based on its pre-*Litchfield* precedent existing at the time of the search in *Edwards*, the court concluded the search was not unreasonable and therefore the evidence could not be excluded under the Indiana good faith statute.²¹

Finally, the court considered whether probable cause supported the issuance of the warrant.²² A detective had found "balled up" Saran Wrap and "remnants of marijuana," as well as some packaging material, in Edward's trash.²³ Relying heavily on the testimony of the detective, the court concluded that the combination of the packaging material, which could be used to receive large quantities of marijuana, and the presence of marijuana seeds, which is itself a crime, supported the finding of probable cause to issue a search warrant.²⁴

B. Cops and Cameras Don't Mix

After the court of appeals' decision in *Thompson v. State*,²⁵ police will likely think twice about allowing the presence of a cameraperson for a television show in an undercover operation. There, an undercover police officer posed as a prostitute and crack addict when arranging a meeting with the defendant at a hotel

14. *Id.*

15. 832 N.E.2d 1072 (Ind. Ct. App. 2005).

16. *Id.* at 1076.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* (quoting IND. CODE § 35-37-4-5(b) (2005)).

21. *Id.* at 1077.

22. *Id.*

23. *Id.* at 1078.

24. *Id.* at 1080.

25. 824 N.E.2d 1265 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 176 (Ind. 2005).

room. She told Thompson she wanted \$100 worth of cocaine and would “make it worth his while” if he brought more.²⁶ Undercover officers waited in the hotel room along with a cameraperson from a television show called “Woman and the Badge.”²⁷

Immediately upon his arrival, Thompson was arrested for attempting to deal cocaine and was taken to the bathroom to be searched. With the camera rolling, the officer explained that he would be looking for “the crack that they [drug dealers] usually keep in the crack.”²⁸ Thompson’s pants were pulled down, he was ordered to bend over, and a package of cocaine was discovered between his buttocks.²⁹ The cameraperson “zoomed in” on the cocaine, and another officer soon brought gloves, which were used to retrieve the cocaine.³⁰

The court of appeals began its analysis with the leading cases from the United States and Indiana Supreme Courts. In *Bell v. Wolfish*,³¹ the Court described the “reasonableness” analysis of the Fourth Amendment that applies to strip searches of pre-trial detainees as not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.³² Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the pace in which it is conducted.³³

More recently, in *Edwards v. State*³⁴ the Indiana Supreme Court reiterated that a search incident to arrest may “involve a relatively extensive exploration of the person” but would be unreasonable if it were “extreme or patently abusive.”³⁵ There, the court held that routine, warrantless strip searches were unreasonable for misdemeanor detainees but that a body search may be appropriate in light of a reasonable likelihood of discovery of evidence.³⁶

Applying these and other precedents, the court in *Thompson* noted that a search incident to arrest, including a strip search, was reasonable in light of the charge for which Thompson was arrested and the conversation in which he agreed to provide the undercover officer with crack cocaine.³⁷ Nevertheless, the court found the facts surrounding the recording of the strip search for its airing on national television to be particularly relevant before asking, “Where should the

26. *Id.* at 1266.

27. *Id.*

28. *Id.* at 1270 (alteration in original).

29. *Id.* at 1266.

30. *Id.*

31. 441 U.S. 520 (1979).

32. *Id.* at 559.

33. *Id.*

34. 759 N.E.2d 626 (Ind. 2001).

35. *Id.* at 629 (citations omitted).

36. *Id.*

37. *Thompson v. State*, 824 N.E.2d 1265, 1268 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 176 (Ind. 2005).

media line be drawn?”³⁸ The court concluded “the line should be drawn here,” where a strip search occurred in a private area completely controlled by police who allowed a civilian to film “the strip search of a suspect naked below the waist.”³⁹ Finally, because the search was a warrantless one and not predicated on a probable cause determination by a neutral and detached magistrate, the court held that the good faith exception to the exclusionary rule did not apply.⁴⁰

II. CONFESSIONS

The court of appeals applied a significant United States Supreme Court case dealing with the police technique of questioning a suspect first and then providing *Miranda* warnings later, after admissions had been made. In *Missouri v. Seibert*,⁴¹ police questioned an arson/murder suspect for thirty to forty minutes before she admitted that the death caused by the arson was not an accident.⁴² She was given a twenty minute break, and police then turned on a tape recorder and gave her a *Miranda* warning. The Court held the ensuing statement inadmissible, reasoning that “it is likely that if the interrogators employ the technique of withholding warnings until after the interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation.”⁴³ Put another way, “when *Miranda* warnings are inserted in the midst of a coordinated and continuing interrogation, they are likely to mislead and ‘deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.’”⁴⁴

In *Drummond v. State*,⁴⁵ the court of appeals relied exclusively on *Seibert* to reverse a trial court’s admission of a tape recorded statement in a child molestation case. In *Drummond*, a detective visited a man serving a prison sentence for molesting his son to question him regarding whether he had also molested his niece. For two hours in an unrecorded and non-*Mirandized* conversation, the detective shared “his experiences and commonalities with [the suspect] in order to convince him to open up” about his niece.⁴⁶ Only after the suspect made an inculpatory statement did the detective provide *Miranda* warnings and turn on a tape recorder.⁴⁷ The court reasoned that the “two-part interrogation appears to be exactly of the character that the *Seibert* court sought to avoid” in reversing the trial court.⁴⁸

38. *Id.* at 1270-71.

39. *Id.* at 1271.

40. *Id.*

41. 542 U.S. 600 (2004) (plurality opinion).

42. *Id.* at 604.

43. *Id.* at 613.

44. *Id.* (quoting *Moran v. Burbine*, 475 U.S. 412, 424 (1986)).

45. 831 N.E.2d 781 (Ind. Ct. App. 2005).

46. *Id.* at 782.

47. *Id.*

48. *Id.* at 784.

Seibert and *Drummond* represent somewhat of a break from the traditional totality of the circumstances approach to the voluntariness of a confession.⁴⁹ These cases draw a fairly bright light that police can easily follow, or, if they fail to follow, can lead to reversal without the uncertainty and likely inconsistent results of the totality-of-the-circumstances approach. Moreover, in all cases in which a confession is at issue, courts must scrutinize the voluntariness of the waiver and the confession carefully. In fact, the Indiana Supreme Court requires proof beyond a reasonable doubt that a defendant voluntarily and intelligently waived his *Miranda* rights and that the confession was voluntarily given.⁵⁰

III. IMPROPER VOIR DIRE QUESTIONS OR LIMITATIONS

Trial courts and lawyers are generally afforded considerable latitude in questioning prospective jurors.⁵¹ Therefore, three appellate reversals for three different types of voir dire errors—two of which were not even preserved by an objection at trial—comprise a fairly significant development in Indiana law.

In *Perryman v. State*,⁵² the defendant objected to the prosecutor's voir dire questions on the grounds that they both "tried the State's case" and conditioned the jury to convict on factors other than the evidence. The supreme court had previously explained that voir dire questions may not condition prospective jurors to receive evidence "with seeds of suspicion firmly planted and anxiously awaiting germination" but should instead encourage "an open mind and resolution to give the defendant the benefit of the reasonable doubt."⁵³ In *Perryman*, a drug possession case, the prosecutor asked the jurors how they might expect drugs to be packaged and how they might distinguish between a drug dealer and drug user.⁵⁴ The court held that the hypothetical questions regarding the distinctions between dealers and users and the quantity of drugs possessed improperly "planted seeds of suspicion, based on the number of bags of cocaine the evidence later revealed Perryman possessed, that Perryman was a drug dealer, even though no such charge was before the jury."⁵⁵ In addition, the court held improper several additional questions that attempted to inculcate jurors of the severity of the "war against drugs," which included the following: "You think drugs are a scary problem here in the country?"; "Are you in agreement that, essentially, it's one of the biggest problems that we have in this country?"; and "Things like theft, robbery, battery, people doing things to one another. It's all

49. See, e.g., *Ringo v. State*, 736 N.E.2d 1209, 1212 (Ind. 2000).

50. The federal constitutional standard is merely a preponderance of the evidence, but the Indiana Supreme Court has made it clear that a higher standard applies in Indiana and "trial courts are bound to apply this standard when evaluating such claims." *Luckhart v. State*, 736 N.E.2d 227, 229 n.1 (Ind. 2000); *Jackson v. State*, 735 N.E.2d 1146, 1153 n.4 (Ind. 2000).

51. See generally *Wentz v. State*, 766 N.E.2d 351, 357 (Ind. 2002).

52. 830 N.E.2d 1005 (Ind. Ct. App. 2005).

53. *Id.* at 1010 (quoting *Robinson v. State*, 297 N.E.2d 409, 411 (Ind. 1973)).

54. *Id.*

55. *Id.*

related [to drugs].”⁵⁶

Unlike in *Perryman*, defense counsel did not object to the voir dire improprieties in the two other cases. Therefore, reversal required a showing of “fundamental error”—error “so prejudicial to the rights of the defendant as to make a fair trial impossible.”⁵⁷ In *Merritt v. State*,⁵⁸ the defendant was charged with possession of cocaine and drug paraphernalia, and the State’s theory was that she constructively possessed the contraband, which was found inside a shoe in the minivan she was driving and in her purse.⁵⁹ After explaining that a possession conviction could be supported by actual or constructive possession, the trial court offered the following example:

I would venture a guess . . . that most of you women who have purses . . . [M]ay have purses at your feet on the floor. I don’t know that to be true because I can’t see. I’m assuming that’s where they are. You still have constructive possession of your purse because it is in a location under your control and you intend to control it there.⁶⁰

The court of appeals held this voir dire example to constitute fundamental error because it was so “strikingly similar to the facts of this case” such that “the jury could easily have been tainted resulting in an unfair trial.”⁶¹

Finally, in *Black v. State*,⁶² the trial court granted the State’s motion in limine to prohibit any questioning of prospective jurors regarding self-defense—the defendant’s likely theory of defense in his trial for murder. Relying on death penalty precedent, the court noted that the State has a “valid right to exclude [a] person who cannot be fair to its position when seek[ing] a penalty of death.”⁶³ Similarly, a defendant who plans to pursue self-defense must be able to assess whether jurors “have firmly-held beliefs which would prevent them from applying the law of self-defense to the facts of the case” and “exclude persons who cannot be fair” to a defendant’s claim of self-defense.⁶⁴ Because the trial court’s limitations failed to ensure a fair and impartial jury, the case was remanded for a new trial.⁶⁵

IV. CONFRONTATION CLAUSE UNDER *CRAWFORD V. WASHINGTON*

As summarized in last year’s survey issue, the Supreme Court in *Crawford*

56. *Id.* (alteration in original).

57. *Willey v. State*, 712 N.E.2d 434, 444-45 (Ind. 1999) (citing *Sauerheber v. State*, 698 N.E.2d 796, 804 (Ind. 1998)).

58. 822 N.E.2d 642 (Ind. Ct. App. 2005).

59. *Id.* at 643.

60. *Id.* at 644 (omissions in original).

61. *Id.*

62. 829 N.E.2d 607 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d (Ind. 2005).

63. *Id.* at 611 (quoting *Burris v. State*, 465 N.E.2d 171, 177 (Ind. 1984)).

64. *Id.*

65. *Id.* at 612.

v. Washington,⁶⁶ broke new Sixth Amendment ground in holding that “the prosecution may introduce a ‘testimonial’ out-of-court statement against a criminal defendant only upon two showings: (1) the witness who made the statement is unavailable; and (2) the defendant had a prior opportunity to cross-examine the witness.”⁶⁷ The initial response to the fairly sweeping language and apparent reach of *Crawford* in Indiana was “reticence to change longstanding practice.”⁶⁸ The Indiana Supreme Court granted transfer in two of the early court of appeals opinions, however, and decisions in those and other cases began to bring some focus to *Crawford* in Indiana during this survey period.

First, in *Hammon v. State*,⁶⁹ the supreme court grappled with the scope of “testimonial” statements, which may not be used at trial without an opportunity to cross-examine. In *Hammon*, police responding to a domestic violence call questioned the complaining witness and then asked her to complete and sign a battery affidavit.⁷⁰ The court concluded that “statements to investigating officers in response to general initial inquiries are nontestimonial but statements made for purposes of preserving the accounts of potential witnesses are testimonial.”⁷¹ Put another way, “testimonial statements are those where a principal motive of either the person making the statement or the person or organization receiving it is to preserve it for further use in legal proceedings.”⁷²

Looking to “the intent of the declarant in making the statement and the purpose for which the police officer elicited the statement,” the court concluded that the victim’s oral statements to police were not testimonial but were simply part of the “preliminary investigation” of the officer who was responding to the emergency.⁷³ The court held that the battery affidavit, however, was testimonial and subject to *Crawford* because its purpose was to record the victim’s account “and at least one principal reason to document [her account] was to provide a basis for its use as evidence or impeachment in [the defendant’s] potential criminal prosecution.”⁷⁴ Nevertheless, the court concluded that the erroneous admission of the affidavit was harmless in light of the “surrounding contrary physical evidence” and the victim’s initial responses to police.⁷⁵

On the same day *Hammon* was decided, the Indiana Supreme Court in *Fowler v. State*⁷⁶ addressed the narrower question of “whether a witness who is present

66. 541 U.S. 36 (2004).

67. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 38 IND. L. REV. 999, 1014 (2005).

68. *Id.* at 1015.

69. 829 N.E.2d 444 (Ind. 2005), *rev’d sub nom.* *Davis v. Washington*, 126 S. Ct. 2266 (2006).

70. *Id.* at 446.

71. *Id.*

72. *Id.*

73. *Id.* at 457-58.

74. *Id.* at 458.

75. *Id.* at 459.

76. 829 N.E.2d 459 (Ind.), *reh’g denied* (Ind. 2005), *cert. denied*, 74 U.S.L.W. 3685 (U.S. Ind. June 12, 2006).

and takes the stand, but then refuses to testify with no valid claim of privilege, is a witness who ‘appears for cross-examination’ (as that term is used in *Crawford*) if no effort is made to compel the witness to respond.”⁷⁷ The victim in *Fowler*, another domestic violence case, took the stand and said she did not want to testify.⁷⁸ Instead of presenting her testimony, the State presented evidence of the battery through a police officer’s recounting of what the victim had told him when he responded to the scene. Because the defendant did not seek to compel the victim to answer questions on cross-examination or recall her after her statements were admitted through a police officer, the court held that she was not unavailable for cross-examination.⁷⁹ Therefore, Fowler’s right to further cross-examination was forfeited.⁸⁰

Although technically a win for the State, the court concluded its opinion in *Fowler* with a stern warning to police officers or others who threaten to have false-informing charges filed against domestic violence victims who do not testify at trial. The court agreed with the court of appeals that “a domestic violence victim should not be placed in the situation of being intimidated not only by the aggressor, but also by the State and its representatives.”⁸¹ It also went a step further in concluding that “to ‘encourage’ a witness by threatening prosecution of a person believed to be innocent is not only inappropriate, it is a crime,” i.e., intimidation.⁸²

Two months after the decisions in these significant domestic battery cases, the court of appeals applied *Crawford* and *Hammon* to the child molestation arena in two opinions. First, in *Anderson v. State*,⁸³ the court addressed the admissibility at trial of a three-year-old victim’s out-of-court statements to her great-grandmother, to an Office of Family and Children (OFC) employee, and to a detective. The court held the child’s statements to her great-grandmother were nontestimonial because they were not elicited for use in future legal proceedings.⁸⁴ Therefore, *Crawford* imposed no bar to their admissibility, which instead is determined by the Protected Persons Statute.⁸⁵

The child’s statements to the detective, however, were testimonial because the principal motive for the interview was an investigation, with the purpose of preserving the child’s statements for use in future legal proceedings.⁸⁶ The statements to the OFC employee, who had specialized training in working with sexually abused children, were similarly testimonial because, under *Hammon*, “the motive of the questioner, more than that of the declarant, is determinative,

77. *Id.* at 465.

78. *Id.* at 462.

79. *Id.* at 469.

80. *Id.* at 470.

81. *Id.* at 471.

82. *Id.*

83. 833 N.E.2d 119 (Ind. Ct. App. 2005).

84. *Id.* at 123-24.

85. *Id.* at 124-25; *see also* IND. CODE § 35-47-4-6 (2005).

86. *Anderson*, 833 N.E.2d at 125.

but if either is principally motivated by a desire to preserve the statement, it is sufficient to render the statement ‘testimonial.’”⁸⁷

Because the statements to the detective and OFC employee were testimonial, the court proceeded to the second *Crawford* step—determining whether the defendant was afforded an opportunity for cross-examination.⁸⁸ The child had been found “incapable of understanding the nature and obligation of an oath” and was therefore unavailable to testify at trial under the Protected Persons Statute.⁸⁹ However, *Crawford* sets a higher bar than the statute, as the court of appeals had previously explained in *Purvis v. State*.⁹⁰ Accordingly, the court in *Anderson* concluded that “at least under the circumstances of this case, a witness unable to appreciate the obligation to testify truthfully cannot be effectively cross-examined for *Crawford* purposes.”⁹¹ The court did not engage in harmless error analysis because it reversed the conviction on other grounds.⁹²

The court employed a similar analysis in *D.G.B. v. State*,⁹³ where it held that a six-year-old child’s statement to a detective was testimonial under *Crawford* because it was made as part of an official investigation and videotaped for possible use in prosecution.⁹⁴ The court further found that D.G.B. was not afforded an opportunity to cross-examine the child, who turned away from the judge when the judge tried to administer the oath, put her hands over her ears, and was then allowed to leave the courtroom.⁹⁵ Although the trial court erred in admitting the child’s statement at trial, the court of appeals found that error to be harmless beyond a reasonable doubt based on the remaining properly admitted evidence.⁹⁶

Although these cases suggest a fairly dramatic reshaping of the procedures and rules in light of *Crawford*, the effect will likely be even greater. The United States Supreme Court granted certiorari in *Hammon* on October 31, 2005, and will soon address the seemingly straightforward question: “Whether an oral accusation made to an investigating officer at the scene of an alleged crime is a testimonial statement within the meaning of *Crawford v. Washington*.”⁹⁷

87. *Id.* (quoting *Hammon*, 829 N.E.2d at 456).

88. *Id.* at 126.

89. *Id.*

90. 829 N.E.2d 572 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 180 (Ind. 2005), *cert. denied*, 126 S. Ct. 1580 (2006).

91. *Anderson*, 833 N.E.2d at 126.

92. *Id.*

93. 833 N.E.2d 519 (Ind. Ct. App. 2005).

94. *Id.* at 528.

95. *Id.* at 525, 528.

96. *Id.* at 528.

97. Petition for Writ of Certiorari, *Hammon v. Indiana*, 126 S. Ct. 552 (No. 05-5705) (citation omitted).

V. *BLAKELY* V. *WASHINGTON* IN INDIANA: NOT SO MUCH OF AN EARTHQUAKE

Shortly after finding herself on the losing side of the Supreme Court's landmark sentencing decision in *Blakely v. Washington*,⁹⁸ Justice O'Connor referred to the decision as a "No. 10 earthquake."⁹⁹ Although its epicenter may have been Washington D.C., the quake's effects certainly reached Indiana. Early signs suggested dramatic changes in Indiana's sentencing procedures, but by the end of the survey period, *Blakely*'s impact on Indiana's sentencing scheme was minimal with any "damage" to the status quo caused not by *Blakely* itself but by the General Assembly's quick-fix, eleventh-hour response in the 2005 session.

As summarized in last year's survey article, *Blakely* posed a number of important questions in Indiana: (1) Does the case impact Indiana's presumptive sentencing scheme?; (2) If so, may the courts cure the unconstitutionality of the statutes and with what remedy?; and (3) Which defendants may reap the benefits of *Blakely* on appeal?¹⁰⁰ The Indiana Supreme Court addressed these—and another important question—in *Smylie v. State*.¹⁰¹

The supreme court had little difficulty in resolving the first question, finding that Indiana's statutory "fixed terms" are remarkably similar to Washington's presumptive ranges held to violate the Sixth Amendment in *Blakely*.¹⁰² Indiana's sentencing statutes and case law require a "presumptive term for each class of crimes, except when the judge finds aggravating or mitigating circumstances deemed adequate to justify adding or subtracting years."¹⁰³ They require, as did the Washington scheme, trial judges to "engage in judicial fact-finding during sentencing if a sentence greater than the presumptive fixed term is to be imposed."¹⁰⁴

Next, the court reiterated its power to "rescue[] constitutional portions of statutes, if possible, when other portions are held unconstitutional."¹⁰⁵ The court observed that, to comply with the Sixth Amendment, Indiana's system could take one of two paths: "(1) our present arrangement of fixed presumptive terms, modified to require jury findings on facts in aggravation, or (2) a system in which there is no stated 'fixed term' (or at least none that has legally binding effect) in which judges would impose sentences without a jury."¹⁰⁶ The court concluded that the first option was "probably more faithful" to the General Assembly's objectives in enacting the presumptive sentencing scheme in 1977 to "abandon

98. 542 U.S. 296 (2004).

99. See Lyle Denniston, *Justices Agree to Consider Sentencing*, N.Y. TIMES, Aug. 3, 2004, at A14.

100. See Schumm, *supra* note 67, at 1019-24.

101. 823 N.E.2d 679 (Ind.), *cert. denied*, 126 S. Ct. 545 (2005). This author served as co-counsel for amicus, Marion County Public Defender Agency, in *Smylie*.

102. *Id.* at 682-83.

103. *Id.* at 683.

104. *Id.*

105. *Id.* at 685.

106. *Id.*

indeterminate sentencing in favor of fixed and predictable penalties.”¹⁰⁷ Therefore, according to *Smylie* any fact that enhanced a sentence beyond the presumptive or “fixed term” requires a jury finding under the existing statutes.¹⁰⁸

As to the third question, the court held that *Smylie*—and other similarly situated defendants—were entitled to raise *Blakely* challenges on appeal, even though no objection had been raised in the trial court and no *Blakely* claim had initially been raised on appeal.¹⁰⁹ First, the court explained that *Blakely* established a new rule of criminal procedure because it “radically reshaped our understanding of a critical element of criminal procedure and ran contrary to established precedent.”¹¹⁰ The court observed that waiver or forfeiture of *Blakely* claims could occur “through the application of the rules governing appellate procedure.”¹¹¹ Claims are normally forfeited when no objection is lodged at trial.¹¹² Nevertheless, the court concluded that *Blakely* presented such novelty that “requiring a defendant or counsel to have prognosticated the outcome of *Blakely* or of today’s decision would be unjust.”¹¹³ Therefore, the court adopted a “rather liberal” approach in which defendants who raised any argument regarding their sentence would be deemed to have adequately preserved a *Blakely* claim on appeal.¹¹⁴ But “those defendants who did not appeal their sentence at all will have forfeited any *Blakely* claim.”¹¹⁵

Finally, the court held that *Blakely* imposed no limitation on the imposition of consecutive sentences for multiple offenses.¹¹⁶ Finding “no language in *Blakely* or in Indiana’s sentencing statute that requires or even favors concurrent sentencing,” the court concluded there was “no constitutional problem with consecutive sentencing so long as the trial court does not exceed the combined statutory maximums.”¹¹⁷ Although a fair reading of the Indiana statutes, this approach largely ignores decades of Indiana Supreme Court precedent that has required trial courts sentencing a defendant on multiple counts to find at least one aggravating circumstance in order to impose consecutive sentences.¹¹⁸

Because *Smylie* was sentenced to two years for each D felony count—six months above the “fixed” or presumptive term of the statute—the enhancement could not stand in the absence of jury findings.¹¹⁹ Therefore, although the order

107. *Id.* at 686.

108. *Id.*

109. *Id.* at 690-91.

110. *Id.* at 687.

111. *Id.* at 689.

112. *Id.*

113. *Id.*

114. *Id.* at 690.

115. *Id.* at 691.

116. *Id.* at 686.

117. *Id.*

118. See, e.g., *Ortiz v. State*, 766 N.E.2d 370, 377 (Ind. 2002); *Morgan v. State*, 675 N.E.2d 1067, 1073 (Ind. 1996).

119. *Smylie*, 823 N.E.2d at 687.

to run the sentences consecutively was affirmed, the case was otherwise remanded “for a new sentencing hearing in which the State may elect to prove adequate aggravating circumstances before a jury or accept the statutory fixed term.”¹²⁰

As highlighted in cases that followed *Smylie*, the remedy for a successful *Blakely* claim was hardly a windfall for defendants: the State could pursue a new sentencing hearing in which aggravators were proved to a jury or stipulate to resentencing in light of aggravating circumstances that do not require a jury determination.¹²¹ Moreover, several appellate opinions held that a defendant’s criminal history is an exception to the requirement of jury fact-finding under the “fact of a prior conviction” exception mentioned in *Blakely* and its predecessors.¹²² Therefore, defendants with a criminal history have largely seen their sentences affirmed on appeal, even if numerous improper aggravators were found by the judge instead of a jury, because “prior criminal history, standing alone, was sufficient to enhance [the defendant’s] sentence.”¹²³ Furthermore, assuming that *Blakely* errors are not structural and therefore are amenable to harmless error analysis, the usual burden rests with the State to show harmlessness beyond a reasonable doubt.¹²⁴ Nevertheless, the Indiana Supreme Court instead has posed the question as whether it could say with confidence that the trial court would have imposed the same sentence if considering only proper aggravating circumstances.¹²⁵

Finally, defendants with multiple convictions will likely receive little, if any, relief based, ironically, on article VII, section 4 of the Indiana Constitution, which is generally thought to provide considerable *relief* to defendants on appeal. The Indiana Supreme Court had interpreted this provision to allow it to alter sentences “within the bounds of *Blakely*.”¹²⁶ Therefore, a defendant who was convicted of aggravated battery and criminal confinement and sentenced to concurrent (but enhanced) sentences of twelve and three years respectively saw virtually the same sentence imposed when the court vacated the enhanced sentences but ordered instead “consecutive sentences of ten years for aggravated battery and one and a

120. *Id.* at 691.

121. *See* Patrick v. State, 827 N.E.2d 30 (Ind. 2005).

122. Stott v. State, 822 N.E.2d 176, 179 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 741 (Ind. 2005); Krebs v. State, 816 N.E.2d 469, 475-76 (Ind. Ct. App. 2004).

123. *See, e.g.,* Muncy v. State, 834 N.E.2d 215, 218 (Ind. Ct. App. 2005) (quoting Williams v. State, 818 N.E.2d 970, 976 (Ind. Ct. App. 2004)).

124. *See id.* at 220 (Barnes, J., dissenting) (citing Freeze v. State, 827 N.E.2d 600, 604 (Ind. Ct. App. 2005)). Judge Barnes’s opinion also offers a particularly thoughtful discussion of the forfeiture of *Blakely* claims for defendants sentenced after *Blakely* but before *Smylie*, noting that the Attorney General had “adamantly and consistently” argued that *Blakely* had no effect in Indiana and was now taking a position “diametrically opposed to its previous position,” which “comes close to judicial estoppel.” *Id.* at 219.

125. *See, e.g.,* Trusley v. State, 829 N.E.2d 923, 927 (Ind. 2005).

126. Williams v. State, 827 N.E.2d 1127, 1128 (Ind. 2005).

half years for criminal confinement.”¹²⁷

More significant than any of these court opinions, however, was the legislative response to the prospect of requiring juries to find aggravating circumstances in the wake of *Smylie*. Trial courts around the State were apparently prepared for the *Smylie* remedy, and months earlier had required the State to file a notice of aggravating circumstances and to present evidence in the second-phase of the jury trial to prove the aggravators beyond a reasonable doubt.¹²⁸ Indeed, the Sentencing Policy Study Commission had proposed legislation along these lines which had already passed the Indiana Senate when *Smylie* was issued.¹²⁹ On the morning of a hearing on the bill in the House committee, however, the bill was amended to adopt the vastly different option mentioned in *Smylie*.¹³⁰ Specifically, the proposed amendment, which unanimously passed the committee and ultimately both houses unanimously with little discussion, significantly changed Indiana’s sentencing statutes by abandoning the presumptive or “fixed” term and replacing it with an “advisory” sentence that judges could “voluntarily consider.”¹³¹ Thus, the presumptive sentencing scheme under which each class of felony had a “fixed” term that could be altered only by the finding of aggravating or mitigating circumstances has been replaced with a broad range in which trial judges can choose any sentence without finding aggravating or mitigating circumstances.¹³² For example, under the amended statute a trial judge sentencing a defendant for a Class B felony no longer needs any justification to deviate from the previous “fixed” term of ten years but may instead impose any sentence between six and twenty years.¹³³

Although the new statute specifically allows the imposition of any sentence “authorized by statute . . . regardless of the presence or absence of aggravating circumstances or mitigating circumstances,” the same provision also imposes the broad and less-than-entirely-clear requirement that the sentence be “permissible under the Constitution of the State of Indiana.”¹³⁴ Presumably this refers to the far-reaching power of appellate revision that often begins with a presumptive term in deciding whether the sentence was “inappropriate” under Appellate Rule 7(B), which implements article VII, sections 4 and 6 of the Indiana

127. *Id.* at 1129.

128. For example, on November 30, 2004, the judges of the Marion County Superior Court, Criminal Division adopted a policy that required the State to file a “Notice of Aggravating Circumstances” no later than ten days after the omnibus date that alleges “facts sufficient in law to support” the aggravator. Policy of the Marion Superior Court Criminal Division of Aggravating Circumstances (filed as Additional Authority in *Smylie*).

129. Michael R. Limrick, *Senate Bill 96: How the General Assembly Returned Problem [sic] of Uniform Sentencing to Indiana’s Appellate Courts*, RES GESTAE, Jan./Feb. 2006, at 19.

130. *Id.* at 21-22.

131. IND. CODE § 35-50-2-1.3 (Supp. 2005).

132. *Id.* §§ 35-50-2-3 to -7.

133. *Id.* § 35-50-2-5.

134. *Id.* § 35-38-1-7.1(d).

Constitution.¹³⁵

Considering the unanimous vote and some insider comments, the intended effect seems not nearly as dramatic as its plain language suggests. For example, Senator Long told the House Committee that he “believe[d] the Indiana Supreme Court [was] committed to uniform sentencing. He was confident that, under the amendment he proposed, appellate review would continue to prevent wide discrepancies in sentencing from one court to another.”¹³⁶ Judge Jane Magnus-Stinson, who aptly referred to the amendment as a “leap of faith by the General Assembly,” noted the statutes would likely need to be amended if they lead to increased sentences and greater prison overcrowding.¹³⁷

Finally, the new sentencing scheme, regardless of its apparent good intentions of simplifying jury trials and maintaining the status quo pre-*Blakely* with a concern for uniform sentencing, is likely to cause an increase in sentencing appeals because of the seemingly broad new discretion afforded to trial court judges. Either the appellate courts will serve as an adequate check on that discretion or—as Judge Magnus-Stinson suggested—the General Assembly will need to reconsider the issue when the appellate dockets and prisons burgeon.

VI. BEYOND *BLAKELY*: THE OTHER WORLD OF SENTENCING

Although *Blakely* ultimately proved only a short-lived and narrow window of relief to criminal defendants without a criminal history, other sentencing and related provisions persist and afford relief in a variety of situations. The most frequently invoked and successful of these is Appellate Rule 7(B), which implements the sentence revision provisions of article VII, sections 4 and 6 of the Indiana Constitution. In addition, limitations are imposed on all aspects of sentences by other constitutional provisions and statutes, a few of which are discussed below.

A. Appellate Rule 7(B)

As noted in the past several survey articles, Appellate Rule 7(B), especially with its fairly broad language that authorizes the appellate court to revise any sentence that is “inappropriate in light of the nature of the offense and character of the offender,” provides relief to many defendants each year. As the supreme court explained, the 2003 amendment to Rule 7(B) “changed its thrust from a prohibition on revising sentences unless certain narrow conditions were met to an authorization to revise sentences when certain broad conditions are satisfied.”¹³⁸

135. Limrick, *supra* note 129, at 23.

136. *Id.* (citing Indiana Judicial Center 2005 Friday Legislative Updates (Mar. 24, 2005)).

137. Charles Wilson, *Sentencing Law May Increase Appeals*, COURIER-JOURNAL (Louisville, Ky.), July 5, 2005, <http://www.courier-journal.com/apps/pbcs.dll/article?AID=/20050705/NEWS02/507050362>.

138. *Neale v. State*, 826 N.E.2d 635, 639 (Ind. 2005).

In *Ruiz v. State*,¹³⁹ for example, the Indiana Supreme Court reduced a maximum twenty-year sentence for child molesting imposed against an intoxicated twenty-year-old defendant for having sex with “a thirteen-year-old girl who described their relationship as boyfriend and girlfriend.”¹⁴⁰ The only aggravating circumstance cited by the trial court was Ruiz’s criminal history of four alcohol-related misdemeanors: driving while intoxicated, giving alcohol to a minor, and twice possessing alcohol as a minor.¹⁴¹ The court found this history insignificant in relation to the Class B felony charge for which he was sentenced. “Although alcohol was involved in these offenses and also in the current crime, the latter is manifestly different in nature and gravity from the misdemeanors.”¹⁴² Reiterating that “appellate courts are reluctant to substitute their judgments for those of the trial court in sentencing,” the court nevertheless held the twenty-year sentence was inappropriate based on the “unrelated and relatively insignificant prior convictions” and reduced the sentence to the presumptive term of ten years.¹⁴³

The most significant question, still unanswered during this survey period, is the reach of Appellate Rule 7(B). As summarized in last year’s article, there has been mounting confusion in the court of appeals regarding whether a defendant may challenge a sentence on appeal after pleading guilty, and if so, what is the content of that challenge.¹⁴⁴ To recap briefly, in *Gist v. State*,¹⁴⁵ the court held that a defendant who pleaded guilty to a Class B felony pursuant to an agreement with a cap of ten years “necessarily agreed that a ten-year sentence was appropriate,” and the sentence was therefore unassailable on appeal under Appellate Rule 7(B).¹⁴⁶ Five months later, a different panel took issue with some of the language from *Gist*, reasoning that only defendants who sign agreements for “a specific term of years, or to a sentencing range other than the range authorized by statute” have forfeited a 7(B) claim.¹⁴⁷ Finally, yet another panel held in *Bennett v. State*¹⁴⁸ held that a defendant who is sentenced in accordance with any plea agreement “has implicitly agreed that his sentence is appropriate.”¹⁴⁹

Additional cases during this survey period added to the conflict and the confusion. The majority in *Mast v. State*¹⁵⁰ took issue with *Bennett*’s broad

139. 818 N.E.2d 927 (Ind. 2004).

140. *Id.* at 927.

141. *Id.* at 929.

142. *Id.*

143. *Id.*

144. Schumm, *supra* note 67, at 1030-32.

145. 804 N.E.2d 1204 (Ind. Ct. App. 2004).

146. *Id.* at 1206-07.

147. *Wilkie v. State*, 813 N.E.2d 794, 804 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 981 (Ind. 2004).

148. 813 N.E.2d 335 (Ind. Ct. App. 2004).

149. *Id.* at 338.

150. 824 N.E.2d 429 (Ind. Ct. App. 2005).

prohibition on 7(B) sentencing challenges whenever a defendant pleads guilty. The *Mast* majority seemingly approved forfeiture for those cases in which a plea agreement “explicitly permits the trial court to sentence the defendant within a given range or caps a sentence” because those pleas included an “implicit waiver provision” that is “entirely logical.”¹⁵¹ But in plea agreements that impose no such limitations and leave sentencing entirely up to the trial court’s discretion, the court reasoned that defendants are in a similar position to those convicted at trial.¹⁵² Moreover, nothing in *Mast*’s wide-open plea agreement suggested consent to an inappropriate sentence, and he did nothing otherwise to waive his sentencing challenge.¹⁵³ Nevertheless, the majority concluded that the sentence imposed was appropriate based largely on the defendant’s “eight prior convictions.”¹⁵⁴ Judge Bailey concurred in the result, adhering to *Bennett*’s view that defendants who plead guilty after being properly advised of the maximum and minimum sentences have implicitly agreed to a sentence within that range.¹⁵⁵

In *Gornick v. State*,¹⁵⁶ the defendant pleaded guilty to charges in three separate cases pursuant to a plea agreement that allowed the trial court to sentence him to no more than thirty-eight years.¹⁵⁷ He received a thirty-eight year sentence, and the court of appeals concluded that he could challenge only the trial court’s exercise of “discretion in weighing the aggravators and mitigators supporting a sentence within the range set forth by a fixed plea,” but could not challenge the sentence under Rule 7(B) because he “would not [have] agree[d] to a sentencing range that would be so unjust as to be characterized as ‘inappropriate.’”¹⁵⁸

Finally, in *Reyes v. State*,¹⁵⁹ the court of appeals explained again that when a defendant pleads guilty pursuant to a plea agreement that “provides for a specific sentencing range, implicit in the defendant’s agreement is his concession that a sentence within that range is appropriate.”¹⁶⁰ The court continued that its holding “does not deny a defendant the opportunity to appeal his or her sentence; such a defendant is merely precluded from challenging his or her sentence as inappropriate under Appellate Rule 7(B).”¹⁶¹ A defendant may still appeal “the trial court’s exercise of its discretion in the finding and balancing of aggravators and mitigators as an abuse of discretion.”¹⁶²

151. *Id.* at 431.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 431-32 (Bailey, J., concurring).

156. 832 N.E.2d 1031 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 184 (Ind. 2005).

157. *Id.* at 1033.

158. *Id.* at 1035.

159. 828 N.E.2d 420 (Ind. Ct. App.), *reh’g denied* (Ind. Ct. App. 2005), *aff’d in part, vacated in part*, 848 N.E.2d 1081 (Ind. 2006).

160. *Id.* at 426.

161. *Id.*

162. *Id.*

Remarkably, none of these opinions make any mention of the Indiana Supreme Court's longstanding precedent or practice of addressing substantive sentencing claims on appeal, after either trial or guilty plea.¹⁶³ Some recent opinions, such as *Gornick*, acknowledge one of the court's opinions, but simply to say that a defendant may still "challenge the trial court's exercise of its sentencing discretion"—just not the appropriateness of the sentence.¹⁶⁴ The ability to challenge a sentence under the burdensome abuse of discretion standard is not an adequate consolation prize to defendants who plead guilty expecting the ability to challenge their sentence under the far more favorable—and constitutionally required—appropriateness standard. The Indiana Supreme Court granted transfer, after hearing oral argument, in two unpublished decisions on September 28, 2005.¹⁶⁵ The court's precedent, practice, policy, and practical concerns all suggest the court should adopt an even more expansive view than any of the court of appeals' decisions—allowing a sentencing appeal by any defendant who pleads guilty pursuant to a plea agreement that affords the trial court any discretion.

For more than two decades, the Indiana Supreme Court has addressed—without limitation—appellate claims for substantive sentence review in cases in which the defendant pleaded guilty pursuant to a plea agreement that afforded some degree of latitude to the trial court. In the earliest of these cases, a defendant pleaded guilty to B felony burglary in exchange for the State dismissing a theft count and habitual offender enhancement.¹⁶⁶ The court upheld the maximum twenty-year sentence as not being manifestly unreasonable, the often-difficult-to-meet standard governing claims before 2003,¹⁶⁷ but it said nothing of the defendant's acquiescence to that sentence or the waiver of his right to challenge it on appeal because of the guilty plea.¹⁶⁸

A twenty-year sentence is certainly far preferable to the fifty or more years that defendant could have received, but other defendants have received far more beneficial plea agreements in the decades since. In *Rust v. State*,¹⁶⁹ a defendant pleaded guilty to felony murder, and the State dismissed a kidnapping charge and

163. The court of appeals general practice of relying primarily on its own opinions rather than those of the Indiana Supreme Court has generated some recent scholarly commentary. See Dragomir Cosanici & Chris E. Long, *Recent Citation Practices of the Indiana Supreme Court and the Indiana Court of Appeals*, 24 LEGAL REFERENCE SERVICES Q. 103, 109 (2005) (noting that, unlike most other state intermediate appellate courts that cite "most often to the courts of last resort in their jurisdiction," the Indiana Court of Appeals "highly prefers citing to itself").

164. *Gornick v. State*, 832 N.E.2d 1031, 1035 (Ind. Ct. App.), *trans. denied* (Ind. 2005).

165. The cases are *Carroll v. State* and *Childress v. State*, and the oral arguments may be viewed on the court's website: <http://www.in.gov/judiciary/supreme/index.html>. This author co-authored an amicus brief on behalf of the Marion County Public Defender Agency in these cases.

166. *Frappier v. State*, 448 N.E.2d 1188, 1189 (Ind. 1983).

167. See *Neale v. State*, 826 N.E.2d 635, 639 (Ind. 2005) (explaining the evolution of the "manifestly unreasonable" to "inappropriate" standard).

168. *Frappier*, 448 N.E.2d at 1189-90.

169. 477 N.E.2d 262 (Ind. 1985).

withdrew its request for the death penalty. The fifty-year sentence was upheld as not manifestly unreasonable.¹⁷⁰ In the ensuing years, several other defendants who faced the possibility of a death sentence entered into plea agreements with the State in exchange for the State not only dismissing the death penalty enhancement but, in some cases, even agreeing to concurrent sentences on the multiple counts covered by the plea agreement.¹⁷¹ In more recent years, defendants have challenged the term of years imposed after the State agreed to dismiss a request for life imprisonment without parole.¹⁷² Finally, still other defendants have entered into plea agreements in which the State agreed to dismiss other counts that could have been ordered consecutively,¹⁷³ or agreed to plead guilty to a lesser charge in exchange for the State dismissing a higher charge.¹⁷⁴ In many of these cases, even though the defendant received a considerable benefit by the State foregoing the death penalty, life imprisonment without parole, consecutive sentences, or a higher-level felony, the Indiana Supreme Court nevertheless fulfilled its duty to review the sentence imposed under article VII, section 4. In many of these cases, sentences were even reduced.¹⁷⁵ None of these opinions hinted, let alone found, that by pleading guilty under a plea agreement that afforded discretion to the trial court the defendant acquiesced, waived, or forfeited his or her constitutional right for appellate sentence review.

The only limitation the Indiana Supreme Court has imposed on the appeal of sentences is the timing of the challenge—not its content. In *Tumulty v. State*,¹⁷⁶ the court made clear that defendants who plead guilty may not challenge their convictions or the acceptance of their guilty plea on appeal, but direct appeal is the proper avenue for challenging the trial court's exercise of sentencing discretion and the manifest reasonableness of the sentence. A broad net was cast,

170. *Id.* at 265.

171. *See, e.g.,* Tackett v. State, 642 N.E.2d 978, 979 (Ind. 1994) (plea required concurrent sentences); Adkins v. State, 561 N.E.2d 787, 788 (Ind. 1990) (same); Steele v. State, 569 N.E.2d 652, 653 (Ind. 1990) (noting that plea allowed trial court option of consecutive or concurrent sentences); *cf.* Penick v. State, 659 N.E.2d 484, 486 (Ind. 1995) (finding that trial court could determine sentence on a single count of murder).

172. *See, e.g.,* Sensback v. State, 720 N.E.2d 1160, 1162-63 (Ind. 1999); Jones v. State, 705 N.E.2d 452 (Ind. 1999).

173. *See, e.g.,* Johnson v. State, 734 N.E.2d 242, 244 (Ind. 2000); Scheckel v. State, 655 N.E.2d 506, 508 (Ind. 1995).

174. Ruiz v. State, 818 N.E.2d 927, 928 (Ind. 2004).

175. *See id.* at 929 (involving a sentence for a B felony child molesting that was reduced from twenty years to ten years); Francis v. State, 817 N.E.2d 235, 236 (Ind. 2004) (involving a sentence for A felony child molesting that was reduced to the presumptive term of thirty years); Widener v. State, 659 N.E.2d 529, 534 (Ind. 1995) (involving consecutive terms of sixty years for felony murder and ten years for conspiracy to commit robbery that were reduced to concurrent terms of fifty and ten years, respectively); Walton v. State, 650 N.E.2d 1134 (Ind. 1995) (involving consecutive sentences of sixty years for two counts of murder that were reduced to consecutive forty-year terms).

176. 666 N.E.2d 394 (Ind. 1996).

allowing sentencing challenges in any cases “where the [trial] court has exercised sentencing discretion.”¹⁷⁷ More recently, in *Collins v. State*,¹⁷⁸ the court cited *Tumulty* in explaining that defendants who plead guilty pursuant to agreements “where the sentence is not fixed by the plea agreement” must challenge their sentence on direct appeal—and not in a post-conviction proceeding. Although a “fixed” plea agreement is not explicitly defined, the common understanding of the term is a specific number of years, e.g., eight years. A plea agreement for a B felony that, for example, sets a cap of twelve years with a floor of six (the statutory minimum) is no more “fixed” than an “open” plea that allows the trial court to impose a sentence within the statutory range of six to twenty years.

At first blush, the *Gornick* approach appears better than the hard-line approach of *Bennett*, which held that every defendant who is advised of the maximum and minimum sentence has acquiesced in a sentence such that it cannot be challenged on appeal. First, *Gornick* and company impose waiver only “when a plea explicitly permits the trial court to sentence a defendant within a set range and is not ‘open.’”¹⁷⁹ The logic behind this seems to be that defendants in such cases have been induced to plead guilty by the benefit of a restricted sentencing range.¹⁸⁰ But *Gornick* does not go far enough. Defendants in the many Indiana Supreme Court cases cited above also received significant, if not greater, inducements to plead guilty, including the dismissal of death penalty and life without parole requests, dismissal of counts that could be ordered served consecutively, and even the dismissal of a higher level charge in exchange for a plea to a lesser charge.

Moreover, the court of appeals’ application of the abuse of discretion standard for those defendants who plead to a capped sentence or range-of-years sentence, while finding review under Rule 7(B) waived, is not supported by practice or precedent. The court of appeals has explained the underlying logic as follows: “Although a trial court may abuse its discretion in weighing the aggravators and mitigators supporting a sentence within the range set forth by a fixed plea, a defendant would not agree to a sentencing range that would be so unjust as to be characterized as ‘inappropriate.’”¹⁸¹ As discussed below, this rationale fails for several reasons.

By entering into a plea agreement, the defendant has done nothing more than “agree” to the ground rules for the trial court. Defendants often believe that a sentence in the upper-range of a capped plea or range of years plea would be “unjust,” and the decision to enter into the plea agreement is simply a decision to try to persuade the court to impose a sentence closer to the bottom of the range—with the understanding that an appeal and the generous “appropriateness” standard of Appellate Rule 7(B) is available if things do not go as planned.

The court of appeals’ rationale enjoys no support in Indiana Supreme Court

177. *Id.* at 396.

178. 817 N.E.2d 230, 231 (Ind. 2004).

179. *Gornick v. State*, 832 N.E.2d 1031, 1035 (Ind. Ct. App.), *trans. denied* (Ind. 2005).

180. *See, e.g., Wilkie v. State*, 813 N.E.2d 794, 803 (Ind. Ct. App.), *trans. denied* (Ind. 2004).

181. *Gornick*, 832 N.E.2d at 1035.

precedent, because in each of the cases cited above, the court has never imposed a limitation on the types of sentencing claims that could be raised after a defendant pleads guilty. Similarly, review under the “abuse of discretion” standard is not a constitutionally adequate substitute for the “appropriateness” review under Rule 7(B). The court has recognized a distinction between (1) procedural challenges to the sentencing statement as relying on improper aggravating circumstances or overlooking significant mitigating circumstances and (2) substantive challenges to the length of the sentence as inappropriate (or, formerly, manifestly unreasonable).¹⁸² Successful procedural challenges generally result in remand for a new sentencing statement,¹⁸³ while successful substantive challenges generally result in the appellate court ordering a reduced term of years.¹⁸⁴ As some of these cases make clear, however, a procedural challenge may fail because the trial court properly finds the aggravators and mitigators, but reduction is still appropriate under the substantive review standard because the number of years imposed fails to withstand the scrutiny of this court’s sentencing principles or comparisons to “cases with roughly similar aggravating and mitigating circumstances.”¹⁸⁵

Since the 2003 amendment to Rule 7(B), however, a challenge to the appropriateness of a sentence is much more likely to result in relief than an “abuse of discretion” or procedural claim. Challenges to the trial court’s finding of aggravating and mitigating circumstances, on the other hand, often fail because trial courts are not obligated to find mitigating circumstances unless they are both significant and clearly supported by the record,¹⁸⁶ and Indiana courts have long held that a single aggravating circumstance “is” or “may be” sufficient to uphold an enhanced, or even a maximum, sentence.¹⁸⁷ Moreover, a presumptive sentence is essentially unassailable under this standard, where it can lead to relief under Rule 7(B).¹⁸⁸

Disparities can (and do) result from sentences imposed after a guilty plea every bit as much as they result from sentences imposed after trial. The Indiana Supreme Court summarized the laudable goal of the power to review and revise sentences under article VII and Rule 7(B) in *Serino v. State*: “[A] respectable legal system attempts to impose similar sentences on perpetrators committing the same acts who have the same backgrounds.”¹⁸⁹ Sentencing principles geared to eradicating disparities between sentences can be applied equally to all sentencing appeals, whether post-trial or post-plea. For example, the Indiana Supreme Court

182. See, e.g., *Noojin v. State*, 730 N.E.2d 672, 678 (Ind. 2000) (citing *Hackett v. State*, 716 N.E.2d 1273, 1276 (Ind. 1999)).

183. See, e.g., *Dowdell v. State*, 720 N.E.2d 1146, 1155 (Ind. 1999).

184. See, e.g., *Carter v. State*, 711 N.E.2d 835, 843 (Ind. 1999).

185. *Id.* at 841.

186. See, e.g., *Dowdell*, 720 N.E.2d at 1154.

187. See, e.g., *Willey v. State*, 712 N.E.2d 434, 446 (Ind. 1999).

188. See, e.g., *Biehl v. State*, 738 N.E.2d 337 (Ind. Ct. App. 2001) (reducing presumptive sentence of thirty years for voluntary manslaughter to the minimum sentence of twenty years).

189. 798 N.E.2d 852 (Ind. 2003).

has long held that the maximum sentence should generally be reserved for the worst offenses and worst offenders,¹⁹⁰ which applies with equal force when reviewing sentences imposed after trial and sentences imposed after a guilty plea.

Defendants who plead guilty in England, the model upon which Indiana's review and revise provision was based, may not only challenge their sentence on appeal, "the Court of Appeal has formulated the principle that . . . an offender's remorse, expressed in his plea of guilty, may properly be recognized as a mitigating factor."¹⁹¹ The Indiana Supreme Court has taken a similar view, recognizing that an early guilty plea saves the victims from going through a full-blown trial and conserves limited prosecutorial and judicial resources; therefore, it is a mitigating circumstance entitled to significant weight.¹⁹²

Finally, apart from these legal and constitutional concerns, there are significant practical questions at issue that could greatly alter the future of plea practice in Indiana courts. Defense lawyers counseling a client who has been offered a plea agreement are hard-pressed to advise the defendant about the possibility of challenging a sentence after the guilty plea. Trial judges engaged in a plea colloquy with the defendant about the waiver of rights walk a veritable minefield in explaining which rights have been forfeited. The confusion continues in advising the defendant of the right to appeal and in appointing appellate counsel.

Every year tens of thousands of criminal cases are resolved in Indiana by guilty plea. As it now stands, defendants confronted with strong evidence of guilt but concerned about the sentence they may receive often enter into a plea agreement, admit their guilt, and perhaps obtain the modest benefit of a reduced charge or restricted sentencing range. Many of these defendants are content with the sentence imposed and do not seek to appeal.¹⁹³ Others, however, have pursued appeals of the sentence, many of which have been successful. If the right to appeal the sentence is found to evaporate with the signing of all or some plea agreements, many defendants primarily concerned about their sentence have no reason to enter into a plea agreement. Although some defendants may be content to roll their dice with a forever-binding sentencing decision from the trial court, many will find little incentive to take such a plea if it means the trial court's sentence is unassailable on appeal.

In sum, the intent and purpose of the 1970 amendment that created the practice of substantive sentence review on appeal in Indiana, coupled with the practical realities of how those appeals have worked in the past and will work in the future, point in the same direction as the Indiana Supreme Court's

190. See, e.g., *Buchanan v. State*, 699 N.E.2d 655, 657 (Ind. 1998).

191. D.A. Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 ALA. L. REV. 193, 194, 201 (1968).

192. *Francis v. State*, 817 N.E.2d 235, 238 (Ind. 2004).

193. Just over 1200 of the appeals decided by the court of appeals last year were criminal cases, and a large number of those appear to have been trials. See INDIANA COURT OF APPEALS, 2004 ANNUAL REPORT 5 (2005). This suggests that a very small percentage of the thousands of guilty pleas each year result in an appeal of the sentence.

longstanding precedent of allowing any defendant who pleads guilty pursuant to a plea agreement that does not fix the sentence at a specific number of years to appeal the appropriateness of that sentence under article VII, sections 4 and 6, as implemented by Appellate Rule 7(B). As with most constitutional rights, waiver of this right may be possible, but only after the defendant has been fully advised and makes a knowing, intelligent, and voluntary waiver.¹⁹⁴ An even simpler solution would be a greater frequency of “set” or “fixed” pleas, for example, twelve years executed, which would best advance the concept of mediation in the criminal justice system with the substantial benefit of finality.

B. Beyond Rule 7(B)

As noted above, even in the absence of a Rule 7(B) claim, the court of appeals has been fairly generous in considering procedural challenges to the trial court’s finding of aggravating and mitigating circumstances. This might lead to a remand for a new sentencing statement with only the proper aggravators and mitigators weighed or, in rare cases, a reduction under the court’s review and revise power.¹⁹⁵ Public Law 71, however, casts considerable doubt about the continued vitality of these requirements with its elimination of any requirement that trial courts find aggravating and mitigating circumstances before imposing sentences within a statutory range.¹⁹⁶

Although directed more to convictions than sentences, violations of Indiana’s Double Jeopardy Clause also provide fairly broad relief to criminal defendants, but the exact source of that protection remains somewhat in doubt.¹⁹⁷ As the court of appeals reiterated in *Caron v. State*,¹⁹⁸ the State must carefully decide how to charge multiple offenses and parse that evidence for juries at trial, lest the resulting multiple convictions be vacated on appeal if there was “a reasonable possibility that the evidentiary facts used by the fact-finder to establish the elements of one offense may also have been used to establish the essential elements of a second challenged offense.”¹⁹⁹

Moreover, Indiana Code section 35-50-1-2(c) imposes an important limitation on consecutive sentences by capping the aggregate sentence to the presumptive for the next higher class of felony when a defendant commits multiple non-violent offenses in a single episode of criminal conduct. In *Massey v. State*,²⁰⁰ the court of appeals held that the trial court violated this provision in ordering a fifty-

194. See, e.g., *Leone v. State*, 797 N.E.2d 743, 750 n.3 (Ind. 2003).

195. See generally Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 34 IND. L. REV. 645, 665-66 (2001).

196. See *supra* notes 131-34 and accompanying text.

197. See generally *Guyton v. State*, 771 N.E.2d 1141 (Ind. 2002) (highlighting the considerable confusion surrounding the source and contours of the protection commonly referred to as “double jeopardy”).

198. 824 N.E.2d 745 (Ind. Ct. App.), *trans. denied* (Ind. 2005).

199. *Id.* at 753-54 (quoting *Davis v. State*, 770 N.E.2d 319, 323 (Ind. 2002)).

200. 816 N.E.2d 979 (Ind. Ct. App. 2004).

year sentence for dealing cocaine fully consecutive to a twenty-year sentence for possession of a firearm by a serious violent felon. Because the defendant's possession of a firearm and possession of cocaine with intent to deal (a Class A felony) were part of a single criminal episode, his sentence for the two offenses was limited to the presumptive sentence for murder (fifty-five years).²⁰¹

In *Mask v. State*,²⁰² the supreme court addressed the effect of the same statute on suspended sentences. There, the trial court sentenced the defendant to three consecutive three-year terms of imprisonment for D felony convictions committed as part of a single episode of criminal activity, but only three of the nine years were ordered executed. The presumptive sentence for a Class C felony is four years.²⁰³ The supreme court reversed the sentence, holding that "[i]ncarceration in the context of subsection (c) does not mean the period of executed time alone. A suspended sentence differs from an executed sentence only in that the period of incarceration is delayed unless, and until, a court orders the time served in prison."²⁰⁴ In holding that any suspended portion of a sentence must be included when applying subsection (c), the court relied on the rule of lenity, "which requires that criminal statutes be strictly construed against the state," noting that the General Assembly has not defined the phrase "term of imprisonment."²⁰⁵

C. GPS as a Condition of Home Detention

Although many sentencing appeals focus on challenges to the length of incarceration imposed, even defendants fortunate to have avoided time in the Department of Correction or county jail sometimes appeal other aspects of their sentences. In particular, cases decided during the survey period addressed challenges to high-tech monitoring as part of home detention and a variety of conditions imposed as part of probation.

Last year, the court of appeals in *Chism v. State*²⁰⁶ held that a defendant serving a sentence on home detention could not be ordered to be monitored

201. *Id.* at 990-91.

202. 829 N.E.2d 932 (Ind. 2005).

203. *Id.* at 936 (citing IND. CODE § 35-50-2-6 (2005)).

204. *Id.* Although *Mask* resolved the executed/suspended distinction in the context of Indiana Code section 35-50-1-2(c), there remains a division in the court of appeals regarding the import of a suspended sentence in reviewing a sentence for appropriateness under Appellate Rule 7(B). The supreme court cited Judge May's concurring opinion in *Beck v. State*, 790 N.E.2d 520, 523 (Ind. Ct. App. 2003) (Mattingly-May, J., concurring), where she expressed the view that the total length of the sentence is all that matters: "A year is still a year, and a sentence is still a sentence." More recently, however, Chief Justice Kirsch noted in dissent, "A year is, indeed, a year, but a suspended sentence is not the same as an executed sentence, and time spent on work release through a community corrections program is not the same as time spent in a state prison." *Eaton v. State*, 825 N.E.2d 1287, 1291 (Ind. Ct. App. 2005).

205. *Mask*, 829 N.E.2d at 936.

206. 813 N.E.2d 402 (Ind. Ct. App. 2004), *vacated*, 824 N.E.2d 334 (Ind. 2005).

through global positioning system (GPS) equipment, which would allow community corrections officials to identify his precise location at any given time with the aid of a satellite.²⁰⁷ On transfer, the Indiana Supreme Court disagreed, interpreting Indiana Code section 35-28-2.5-3 as creating two categories of “monitoring device[s]”: (1) devices that require an offender’s consent to allow correction personnel to view or listen to activities within the home and (2) devices that may be used without an offender’s consent and simply specify whether an offender is at home without revealing the more intimate information.²⁰⁸ The court concluded that GPS falls in the second category, reasoning that the fact that it “will tell corrections where Chism is when he is not at home does not destroy its status as a device that broadcasts only location.”²⁰⁹

In apparent response to the court of appeals’ decision, and consistent with the thrust of the Indiana Supreme Court’s decision, the General Assembly amended the statute, effective July 1, 2005, to specifically provide that conditions of home detention may “require the use of surveillance equipment and a monitoring device that can transmit information twenty-four (24) hours each day regarding an offender’s precise location.”²¹⁰

D. Conditions of Probation

Even more common than the imposition of special conditions on a home detention sentence is the imposition of a variety of conditions on a probationary term and the court of appeals has upheld the imposition of many types of conditions. For example, in *Stott v. State*,²¹¹ the trial court forbade a defendant convicted of child molesting from “any contact with children under the age of 18 and from entering within 1000 feet of any school or daycare center.”²¹² In *Taylor v. State*,²¹³ the trial court ordered a defendant convicted of D felony operating a vehicle while intoxicated to establish paternity for a child he had always supported financially and who had not required public assistance. Although trial courts retain relatively broad discretion to grant probation and establish conditions “to create law-abiding citizens and to protect the community,” those conditions must “have a reasonable relationship to the treatment of the accused and the protection of the public.”²¹⁴

As an initial matter, both *Stott* and *Taylor* seem to suggest that the defendants should have objected to the conditions of probation at sentencing. The court in

207. *Id.* at 408-11.

208. *Chism v. State*, 824 N.E.2d 334, 334-35 (Ind. 2005).

209. *Id.* at 335.

210. IND. CODE § 35-38-2.5-7 (Supp. 2005).

211. 822 N.E.2d 176 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 741 (Ind. 2005). The author of this article served as appellate counsel for Mr. Stott.

212. *Id.* at 179.

213. 820 N.E.2d 756 (Ind. Ct. App.), *trans. denied* (Ind. 2005).

214. *Id.* at 760 (quoting *Jones v. State*, 789 N.E.2d 1008, 1010 (Ind. Ct. App. 2003)).

Stott cites *Spears v. State*,²¹⁵ a case that addressed a challenge to failing to replace a juror after extra-judicial contact, a situation in which a timely objection would have permitted inquiry, admonishment, or corrective action. Although immediate correction of trial errors is essential because the trial is continuing to unfold, objections to sentencing errors seem unnecessary because the game is already over. Requiring an objection to each probation condition would likely transform the trial court's solemn rendering of its decision into something quite different and contentious.

Although *Stott* challenged his probation conditions as overly broad, the court of appeals focused on vagueness, holding that the conditions were specific and accurately defined.²¹⁶ Its analysis did not squarely address whether the probation conditions tread too heavily on constitutionally protected rights, such as *Stott's* fundamental right to parent his own daughter or to travel freely and leave his home without fear of unwittingly entering within 1000 feet of a school or daycare center. The latter condition went beyond the statutory condition of barring a probationer from living within 1000 feet of a school, which has been previously upheld,²¹⁷ and it would seem the conditions were not reasonably related to rehabilitation when less restrictive means could have been employed.

The requirement in *Taylor* that a defendant who was convicted of operating a vehicle while intoxicated establish paternity for his child seems to bear little relationship to protecting the public.²¹⁸ The court relied on *Gordy v. State*,²¹⁹ a case in which the defendant was required to establish paternity for four children after attempting to cash an AFDC check issued to the children's mother. There, the condition was related to the offense and the concern that he support his dependents. In cases involving a plethora of other charges, such as in *Taylor*, the nexus is far more attenuated.

The decisions in *Taylor* and *Stott* signal broad discretion for trial courts in imposing probation conditions.²²⁰ Transfer was denied in both cases, and the Indiana Supreme Court has not yet set forth a test for constitutional challenges of probation conditions. Professor Andrew Horowitz has summarized the two basic approaches of other courts.²²¹ The court of appeals has adopted the first of these,

215. 811 N.E.2d 485, 488 (Ind. Ct. App. 2004).

216. A statute or probation condition is void for vagueness "if its prohibitions are not clearly defined." *Klein v. State*, 698 N.E.2d 296, 299 (Ind. Ct. App. 1998). Overbreadth, however, is "designed to protect innocent persons from having the legitimate exercise of their constitutionally protected freedoms fall within the ambit of a statute written more broadly than needed to proscribe illegitimate and unprotected conduct." *Matheney v. State*, 688 N.E.2d 883, 904 (Ind. 1998).

217. *See Carswell v. State*, 721 N.E.2d 1255, 1259-60 (Ind. Ct. App. 1999); *see also* IND. CODE § 35-38-2-2.2 (2003).

218. *Taylor*, 820 N.E.2d at 760.

219. 674 N.E.2d 190 (Ind. Ct. App. 1996).

220. Indiana is not unique in this regard. *See generally* Andrew Horowitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75 (2000).

221. *Id.* at 99-109.

i.e., the three-part test of *United States v. Consuelo-Gonzales*,²²² which requires only that probation conditions be “reasonably related” to the purpose of probation by inquiring into the “purposes sought to be served by probation, the extent to which the full constitutional guarantees available to those not under probation should be accorded probationers, and the legitimate needs of law enforcement.”²²³ As noted by Horowitz and others, “It is hard to imagine a constitutional standard that could be less definitive or more subject to a result-oriented approach.”²²⁴

The other approach—the “unconstitutional conditions” doctrine—appears to be at least a slight improvement.²²⁵ It employs a balancing test that permits the “infringement of liberties” only when state action is “reasonably related to legitimate policy objectives and substitute measures are unavailable.”²²⁶ The following four factors are balanced: “(1) the nature of the right affected; (2) the degree of the infringement of the right; (3) the nature of the benefit conferred; and (4) the nature of the state’s interest in conditioning the benefit.”²²⁷ Adopting and expounding on one of these tests or some variation of them would seemingly be a useful exercise of the court’s transfer jurisdiction in light of the frequency with which such claims arise.

E. Sentencing After Probation Revocation

In *Stephens v. State*,²²⁸ the court of appeals surprised many trial judges and lawyers in applying a plain reading to the probation revocation statute—a reading that conflicted with longstanding practice. There, the defendant was originally sentenced to ten years imprisonment with four years suspended to probation. His probation was later revoked because he missed a counseling session and had been convicted of driving with a suspended license. He was sentenced to three years imprisonment—not the four initially suspended at sentencing.²²⁹

Indiana Code section 35-38-2-3(g) provides three options that trial courts “may” pursue once a petition to revoke probation is filed: (1) continue probation with or without modifying the conditions, (2) extend the period of probation up to a year, or (3) “order execution of the sentence that was suspended at the time of initial sentencing.”²³⁰ Agreeing with the State’s argument on cross-appeal, the court of appeals held that once probation was revoked, the trial court must order execution of the entire sentence originally suspended at the time of sentencing.²³¹ However, the court held that the trial court retained the statutory authority to

222. 521 F.2d 259 (9th Cir. 1975).

223. *Id.* at 262; *see also Patton v. State*, 580 N.E.2d 693, 698 (Ind. Ct. App. 1991).

224. Horowitz, *supra* note 220, at 101 & nn.151-52.

225. *Id.* at 105.

226. *Id.*

227. *Id.* at 106.

228. 801 N.E.2d 1288 (Ind. Ct. App.), *vacated*, 818 N.E.2d 936 (Ind. 2004).

229. *Id.* at 1289.

230. IND. CODE § 35-38-2-3(g) (Supp. 2005).

231. *Stephens*, 801 N.E.2d at 1292.

continue probation with the same or modified terms, and Indiana Code section 35-38-2-2.3(c) permits imprisonment as a condition of probation.²³²

In reversing the court of appeals and upholding the three-year sentence, the Indiana Supreme Court took issue with the court of appeals' interpretation, which "permits the trial court to order an additional three-year term if it keeps Defendant on probation, but it does not permit the trial court to order a three-year term if it revokes probation."²³³ The court relied heavily on the purpose of probation and its view of legislative intent, concluding that to achieve probation's "humane purposes of avoiding incarceration and of permitting the offender to meet the offender's financial obligations" the statutes allow trial courts "to order the same amount of executed time following a probation violation whether or not it actually revokes probation."²³⁴

The court's ultimate reiteration of its holding, however, is likely to cause some confusion in the lower courts and require reconsideration in the future: "[A] trial court has the statutory authority to order executed time following revocation of probation that is less than the length of the sentence originally suspended, so long as, when combined with the executed time previously ordered, the total sentence is not less than the statutory minimum."²³⁵ In *Stephens*' B felony case, the statutory minimum was six years,²³⁶ which had previously been served. Therefore, the three additional years posed no problem. In other cases, however, this will not be the case.

For example, assume a defendant's first felony is forgery for signing another person's name to a check, even though for a relatively small amount of money. The trial court imposes the minimum sentence—two years for a class C felony—and suspends all of it. If the defendant later violates his probation by missing a couple of appointments with his probation officer or picking up a minor, unrelated misdemeanor offense, the trial court would seemingly be required, according to *Stephens*, to sentence him to the entire two-year suspended sentence if it revokes his probation. However, the sentencing statutes provide that the minimum term of imprisonment does not have to be executed, except for certain offenses or defendants with certain criminal histories.²³⁷ A requirement of ordering execution of the entire previously suspended sentence in such a case would seem contrary to legislative intent and the flexible purposes of probation

232. *Id.*

233. *Stephens v. State*, 818 N.E.2d 936, 941 (Ind. 2004).

234. *Id.* at 941-42. Shortly after *Stephens*, in *Sandlin v. State*, 823 N.E.2d 1197 (Ind. 2005), the supreme court left open the possibility for challenges of sentences imposed upon the revocation of probation. Because some pre-*Stephens* court of appeals cases had suggested that trial courts were required to impose the entire amount of suspended time, the supreme court suggested that remand "might well be appropriate" in some such cases. *Id.* at 1198. But the trial court in *Sandlin* had said nothing to suggest it subscribed to that view, so the supreme court presumed the trial court acted appropriately and affirmed the sentence. *Id.*

235. *Stephens*, 818 N.E.2d at 942.

236. *Id.* at 943 (citing IND. CODE § 35-50-2-5 (2003)).

237. See IND. CODE § 35-50-2-2(b) (2003).

cited elsewhere in *Stephens*. Considering the large number of probation revocations each year—6500 in felony cases during 2003 alone—this issue seems likely to surface again soon.²³⁸

Finally, although arguably unnecessary after the supreme court's opinion in *Stephens*, the General Assembly amended Indiana Code section 35-38-2-3 in 2005 to explicitly allow trial courts to order execution "of *all or part of* the sentence that was suspended at the time of the initial sentencing."²³⁹ This does not address the apparent new requirement of *Stephens* that requires imposition of the minimum term upon any revocation of probation.

VII. DEATH PENALTY

As highlighted above, the focal point of developments in the realm of criminal law and procedure is generally the courts, although the legislature is often a significant player as well. The executive branch, however, is seldom thought to be an equal—or at least equally active—player in these issues. Although Governors sign and occasionally propose or push important legislation, the starkest example of executive power in relation to the death penalty is in the realm of clemency. Although the General Assembly did not amend Indiana's death penalty statute during the survey period, both the Indiana Supreme Court and the executive branch were fairly busy in the death penalty realm.

A. Mental Retardation

Since 1994, Indiana has exempted mentally retarded individuals from eligibility for the death penalty.²⁴⁰ The current version of the statute provides fairly detailed pretrial procedures under which a defendant may raise, and trial courts may adjudicate, claims of mental retardation.²⁴¹ The statute places the burden on defendants to "prove by clear and convincing evidence that the defendant is a mentally retarded individual."²⁴²

In *Pruitt v. State*,²⁴³ however, the Indiana Supreme Court held that the State may not require proof of mental retardation by clear and convincing evidence.²⁴⁴ The court grounded its decision in *Cooper v. Oklahoma*,²⁴⁵ which held unconstitutional a state's requirement that a defendant prove incompetence to stand trial by clear and convincing evidence and in *Atkins v. Virginia*,²⁴⁶ which broadly held that the execution of a mentally retarded defendant violates the

238. See *Stephens*, 818 N.E.2d at 942 n.7.

239. PUB. L. 13-2005, 2005 IND. ACTS 1329-30.

240. IND. CODE § 35-36-9-6.

241. *Id.* §§ 35-36-9-1 to -7.

242. *Id.* § 35-36-9-4.

243. 834 N.E.2d 90 (Ind.), *reh'g denied* (Ind. 2005), *cert. denied* (No. 05-10540) (U.S. Ind. June 26, 2006).

244. *Id.* at 103.

245. 517 U.S. 348 (1996).

246. 536 U.S. 304 (2002).

Eighth Amendment. Moreover, the court in *Pruitt* noted that “only a relatively small number of jurisdictions follow Indiana in requiring clear and convincing evidence or an even higher standard.”²⁴⁷ Nevertheless, the trial court had well anticipated the possibility of a lower standard of proof and had specifically found that Pruitt had failed to make the requisite showing under the appropriate preponderance of the evidence standard.²⁴⁸

Pruitt was required to prove both “significantly subaverage intellectual functioning” and “substantial impairment of adaptive behavior” under the statute.²⁴⁹ Although the court affirmed the trial court’s ultimate finding that Pruitt was not mentally retarded because it was supported by a lack of evidence of subaverage intellectual functioning, the court addressed his claim regarding substantial impairment of adaptive behavior in considerable detail.²⁵⁰ As to the second prong, the court agreed with Pruitt that the trial court’s standard, which relied on the approach taken by its expert, “was too restrictive” and its findings were therefore “not supportable.”²⁵¹

B. Severe Mental Illness

Arthur Baird’s execution was set for August 31, 2005, but Governor Daniels granted clemency just two days before the scheduled execution—and the issue of executing the mentally ill assumed new significance in Indiana.²⁵² Baird murdered his pregnant wife and his parents in 1985. Expert opinion was divided about his sanity at the time of the offenses, and Baird had litigated issues related to mental illness for the past two decades.²⁵³

A clemency decision was required after the Indiana Supreme Court denied Baird permission to file a successive petition for post-conviction relief (“PCR”), just six days before his scheduled execution, to litigate his claim of incompetence to be executed under *Ford v. Wainwright*.²⁵⁴ The three-justice majority concluded that, although Baird may be suffering from a mental illness and be uncommunicative or in denial about his pending execution, he understood he was about to be executed for the murder of his parents.²⁵⁵

Justice Boehm, joined by Justice Rucker, dissented, and would have allowed Baird to file a successive PCR “to explore the issue never adjudicated in his earlier appeals, namely his current mental condition judged by the Eighth

247. *Pruitt*, 834 N.E.2d at 102.

248. *Id.* at 103.

249. *Id.* at 103 (quoting IND. CODE § 35-36-9-2 (2004)).

250. *Id.* at 106-10.

251. *Id.* at 110.

252. See Kevin Corcoran, *Daniels Spares Mentally Ill Killer: Man Who Was Set to Die This Week Will Spend Life in Prison; Debate on Issue Likely to Grow*, INDIANAPOLIS STAR, Aug. 30, 2005, at A1.

253. *Baird v. State*, 833 N.E.2d 28 (Ind.), *cert. denied*, 126 S. Ct. 312 (2005).

254. *Id.* at 30-31 (citing *Ford v. Wainwright*, 477 U.S. 399 (1986)).

255. *Id.* at 31.

Amendment standard that prohibits execution of the insane.”²⁵⁶ The dissent acknowledged the lack of a clear standard regarding mental illness and the death penalty in the wake of *Atkins v. Virginia*,²⁵⁷ which held that execution of the mentally retarded violates the Eighth Amendment, and *Roper v. Simmons*,²⁵⁸ which held the Eighth Amendment also bars the execution of juveniles.²⁵⁹ *Atkins* left the standard for mental retardation and procedural issues to the States to determine, and the same is arguably true of the definition for insanity.²⁶⁰ In any event, the dissent concluded that it should “exercise extreme caution in executing a person whose mental health is plainly questionable unless we can be certain the person does not meet the *Ford* standard, much less the more restrictive standard that may now apply in light of *Atkins* and *Roper*.”²⁶¹

Although the issue of executing a person suffering from severe mental illness was ultimately resolved in Baird’s favor with the grant of clemency, the underlying concerns persist. The dissent noted the absence of any “statutory provision addressing either the standard of insanity or any procedural requirements to guard against execution of the insane.”²⁶² Other states have specific procedures requiring prison officials or others to examine death row inmates when sanity is in doubt, and the General Assembly may well wish to consider adopting similar provisions here.²⁶³

C. Clemency: No Parole Board Required

In addition to the grant of clemency for Baird by Governor Daniels, Governor Kernan also granted clemency to a death row inmate during the survey period. Just days before leaving office, Governor Kernan granted clemency to Michael Daniels, who had been on death row for nearly twenty-five years.²⁶⁴ The decision was notable not only for its substance but for its timing. Daniels had a pending habeas claim in federal court and no execution date set, but his lawyers and those for eight other death row inmates filed petitions for clemency directly with outgoing Governor Kernan shortly before he left office.²⁶⁵ Kernan granted only Daniels’ petition, noting concerns of Daniels’ mental illness and “lingering questions about whether he was the triggerman.”²⁶⁶ Moreover, Daniels’ two

256. *Id.* at 34 (Boehm, J., dissenting).

257. 536 U.S. 304 (2002).

258. 543 U.S. 551 (2005).

259. *Id.* at 575.

260. *Baird*, 833 N.E.2d at 35.

261. *Id.*

262. *Id.* at 34.

263. *Id.* at 35.

264. *Id.*

265. Richard D. Walton, *Kernan Commutes Man’s Death Sentence*, INDIANAPOLIS STAR, Jan. 8, 2005, at A1.

266. *Id.*

codefendants had already been released from prison.²⁶⁷

Although each clemency grant in Indiana has been grounded in the unique facts of the case and supported by detailed statements from the Governor, the three grants of clemency in little over a year—Darnell Williams²⁶⁸ and Michael Daniels by Governor Kernan, and Arthur Baird by Governor Daniels—all have one additional similarity: Each was preceded by a 3-2 opinion of the Indiana Supreme Court, with a dissent by Justice Boehm and Justice Rucker that highlighted at least some of the concerns that ultimately were cited by the Governor in granting clemency.²⁶⁹

267. *Id.*

268. The grant of clemency to Darnell Williams was discussed in last year's survey. *See* Schumm, *supra* note 67, at 1027-28.

269. *See Baird*, 833 N.E.2d at 32-35 (Boehm, J., dissenting); *Williams v. State*, 793 N.E.2d 1019, 1030-33 (Ind. 2003) (Boehm, J., dissenting & Rucker, J., dissenting); *Daniels v. State*, 741 N.E.2d 1177, 1191-95 (Ind. 2001) (Boehm, J., dissenting).

RECENT DEVELOPMENTS IN EMPLOYMENT LAW

LUCETTA D. POPE*

INTRODUCTION

In some ways, the survey period has been an uneventful year of incremental interpretations of decades-old civil rights statutes and labor laws. Title VII, the biggest contributor to the nation's labor docket, is now more than forty years old, and the Americans with Disabilities Act has been around and analyzed for over twenty. But even old statutes produce new law, and a handful of recent decisions may significantly alter the scope of employer liability. For the first time, the Supreme Court has interpreted Title IX to allow lawsuits by plaintiffs claiming *retaliation* for their complaints about discrimination under that act. This survey period also saw the expansion of potential claims under the Age Discrimination in Employment Act (the "ADEA"), as the Supreme Court opened the door for plaintiffs who cannot show that their employers *intentionally* treated them unfavorably because of age. And in another important decision for employers and employees alike, the Supreme Court held that time employees spend walking between changing and production areas is compensable under the Fair Labor Standards Act, while time spent waiting to put on the first piece of gear is not.

Notably, the survey period reveals little influence by global events. Neither the attacks of September 11 nor the ensuing conflicts abroad have registered a sustained effect on discrimination claims. The Equal Employment Opportunity Commission ("EEOC") received 79,432 charges of discrimination against private employers and government entities in 2004,¹ and reports that claimants most frequently alleged race-, sex-, or retaliation-based discrimination.² While national origin discrimination charges jumped from 8025 in 2001 (largely pre-September 11) to 9046 in 2002, they fell to 8450 and 8361 in 2003 and 2004, respectively. Similarly, religious discrimination charges, which have steadily increased over the past decade, climbed from 2127 in 2001 to 2572 in 2002, and then fell somewhat to 2532 and 2466 in the following two years. By contrast, race claims fell slightly from 2001 to 2002, and sex claims moderately rose.³ Trends aside, religious and national origin discrimination claims remain modest features of the employment landscape. Overall, only eleven percent of EEOC charges involved national origin claims, and only three percent involved claims of religious discrimination, while sex discrimination was claimed in thirty

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1. EEOC Releases Fiscal 2004 Year-End Data (Feb. 15, 2005), <http://www.eeoc.gov/press/2-15-05.html>.

2. *Id.* On average, these charges were processed in 165 days, and almost twenty percent resulted in favorable outcomes for the charging party. The agency filed 378 "merits" lawsuits, and recovered \$420 million in relief. *Id.*

3. These statistics are found on various pages of the EEOC website. U.S. Equal Employment Opportunity Commission, Homepage, <http://www.eeoc.gov> (last visited July 5, 2006).

percent, race discrimination in thirty-five percent, and retaliation in twenty-nine percent of EEOC charges.⁴

In a survey period that has reverberated with controversy over fundamental rights, workplace rights remain fundamentally the same. With few exceptions, developments have been gradual, as employers and employees contest modest patches of legal terrain.

I. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. *Disparate Impact*

This survey period produced important precedent under the Age Discrimination in Employment Act⁵—answering what the New York Times called “one of the most disputed questions in civil rights law: how to win an age discrimination case in the absence of proof that an employer deliberately singled out older workers for unfavorable treatment.”⁶ In *Smith v. City of Jackson*,⁷ the Supreme Court held that the ADEA allows recovery in disparate-impact cases, though in a narrower band than support Title VII claims.⁸ Confirmation that disparate impact claims are cognizable under the ADEA would have been far less noteworthy fifteen years ago. Disparate impact theory has long been a widely-accepted means of proving discrimination under Title VII, which was amended to codify such claims in 1991. And as *Smith* acknowledges, appellate courts had uniformly interpreted the ADEA to authorize “disparate-impact” theory recoveries in appropriate cases for decades.⁹ But that changed in 1993,¹⁰ when the Supreme Court decided *Hazen Paper Co. v. Biggins*.¹¹ Following *Hazen Paper*—a case that distinguished an employee’s age from his seniority for purposes of analyzing motives under an intentional discrimination theory—the Seventh as well as First, Tenth, and Eleventh Circuits held (contrary to EEOC interpretation and regulation)¹² that no disparate impact liability could arise under the ADEA.¹³ *Smith* thus returns the courts to what Justice Stevens calls a “pre-

4. About sixteen percent of charges alleged sexual harassment, twenty percent alleged age discrimination, and nineteen percent contained complaints of discrimination based on a disability.

5. 29 U.S.C. §§ 621-634 (2000).

6. Linda Greenhouse, *Supreme Court to Consider Role of Intent in Age Bias*, N.Y. TIMES, Mar. 20, 2004, at A16.

7. 544 U.S. 228 (2005).

8. *Id.* at 232. The case was decided by a 5-3 vote (Chief Justice Rehnquist not participating).

9. *Id.* at 236-37.

10. *Id.* at 237 n.9 (detailing the split among circuits).

11. 507 U.S. 604 (1993).

12. Compare 29 C.F.R. § 1625.7(d) (2004).

13. See *Smith*, 544 U.S. at 237 n.9. Thus, in *Adams v. Ameritech Services, Inc.*, 231 F.3d 414, 422 (7th Cir. 2000), for example, the Seventh Circuit acknowledged a circuit split and affirmed its position that “disparate impact is not a theory available to age discrimination plaintiffs in this

Hazen Paper consensus” concerning disparate-impact liability.¹⁴

Smith v. City of Jackson examined the claim of certain police and public safety officers that salary increases received from their employer, the City of Jackson, Mississippi, were less generous than increases awarded officers under the age of forty.¹⁵ Jackson had adopted a pay plan on October 1, 1998, to “attract and retain qualified people . . . and ensure equitable compensation to all employees regardless of age, sex, race and/or disability.”¹⁶ In May 1999, Jackson revised the plan, in part to raise starting salaries to the national average.¹⁷ As a result, officers with less than five years of service received proportionately greater raises, while officers over forty tended to fall into the high-seniority group that received proportionately less.¹⁸ A group of the older officers sued Jackson under the ADEA, claiming both deliberate age discrimination, and that the plan adversely impacted them (i.e., had a “disparate impact”). After the district court granted summary judgment on both claims, the court of appeals affirmed the dismissal of the disparate impact claim, prompting the Supreme Court to grant certiorari.¹⁹

Writing for the plurality,²⁰ Justice Stevens compared the ADEA to Section 703(a) of Title VII, which the Court had interpreted to prohibit “disparate impact” discrimination in *Griggs v. Duke Power Co.*²¹ The Court reasoned: “Neither § 703(a)(2) nor the comparable language in the ADEA simply prohibits actions that ‘limit, segregate, or classify’ persons; rather the language prohibits such actions that ‘deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individuals’ race or age.”²²

Textual differences between the ADEA and Title VII, however, led the Court to recognize a narrower range of actionable practices.²³ Thus, Justice Stevens pointed to the “RFOA” clause, which allows employers to avoid liability if the disparate impact resulted from “reasonable factors other than age.”²⁴ The Court also found that unlike Title VII, an employer’s policy need not rest on a

circuit.”

14. *Smith*, 544 U.S. at 238.

15. *Id.* at 230.

16. *Id.* at 231.

17. *Id.*

18. *Id.*

19. *Id.* at 231-32. The appellate court remanded the intentional discrimination claim for further discovery. *Id.* at 231.

20. *Id.* at 229. Justice Stevens is joined by Justices Souter, Ginsburg, and Bryer in all parts of his opinion.

21. 401 U.S. 424 (1971).

22. *Smith*, 544 U.S. at 235 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 985 (1988)).

23. *Id.* at 240.

24. *Id.* at 233 (citing § 4(f)(1) of the ADEA, 81 Stat. 603) (“permitting ‘otherwise prohibited’ action ‘where the differentiation is based on reasonable factors other than age’”).

“business necessity,” but only a “reasonable” judgment.²⁵ Further, the Court noted that *Wards Cove Packing Co. v. Antonio*²⁶ set the standard for ADEA disparate impact claims, though the 1991 Amendments revised that standard for Title VII cases.²⁷ Under *Wards Cove*, the plaintiff must show a close nexus between a specific practice and any observed statistical disparities to prove unlawful conduct.²⁸

Applying these principles to the officers of Jackson, the Court found their claim inadequate. First, the officers fatally neglected “to identif[y] any specific test, requirement, or practice within the pay plan that” adversely affects older workers, *i.e.*, to isolate the specific employment practice that violates the statute.²⁹ And second, the record showed that Jackson based its plan on “reasonable factors other than age.”³⁰ In finding a non-discriminatory basis for its plan, the Court noted that Jackson pegged wages for each of five basic positions to the survey numbers for comparable communities in the Southeast.³¹ The “disparate impact,” reasoned the Court, arose from Jackson’s decision to base raises on seniority—an “unquestionably reasonable” decision given its goals to retain police officers.³² That other methods may have achieved Jackson’s legitimate goal did not matter.³³ “Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.”³⁴

The subject of disparate-impact claims under the ADEA elicited a diversity of opinion from the Court. Justice Scalia concurred with Justice Steven’s opinion, but deferred to the agency (in this case, the EEOC) interpretation under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*³⁵ Calling this “an absolutely classic case for deference to agency interpretation,” he pointed to EEOC regulations and statements clarifying that “employment criteria that are age-neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as a business necessity.”³⁶ While concurring in the judgment, Justice O’Connor (joined by Justices Kennedy and Thomas) would have affirmed “the judgment below on the ground that

25. *Id.* at 243.

26. 490 U.S. 642 (1989).

27. *Smith*, 544 U.S. at 240.

28. *Id.* at 241.

29. *Id.*

30. *Id.*

31. *Id.* at 241-42.

32. *Id.* at 242.

33. *Id.* at 243.

34. *Id.*

35. *Id.* (Scalia, J., concurring); 467 U.S. 837 (1984).

36. *Smith*, 544 U.S. at 244 (quoting Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47,724, 47,725 (Sept. 29, 1981), and citing 29 C.F.R. § 1625.7(d) (2004)).

disparate impact claims are not cognizable under the ADEA.”³⁷ In a lengthy opinion, Justice O’Connor disputed Justice Stevens’s statutory interpretation, noting that Section 4(a) of the ADEA makes it unlawful for employers to engage in certain practices “because of such individual’s age.”³⁸ “That provision,” she insisted, “plainly requires discriminatory intent, for to take an action against an individual ‘because of such individual’s age’ is to do so ‘by reason of’ or ‘on account of’ her age.”³⁹

A potentially significant expansion of potential employer liability under the ADEA, *Smith v. City of Jackson* should nevertheless protect employers who base their policies on reasonable factors other than age.

B. Disparate Treatment (Intentional Discrimination)

The Seventh Circuit turned its attention to disparate treatment—that is, intentional discrimination—in two ADEA cases decided during the survey period. In *Isbell v. Allstate Insurance Co.*,⁴⁰ the Seventh Circuit addressed claims that Allstate Insurance Co. intentionally discriminated against older workers when it reorganized its workforce and eliminated 6400 jobs. Doris Isbell worked for Allstate until the company enacted a plan to sell insurance through a network of exclusive independent contractors, rather than employees.⁴¹ Effective June 30, 2000, Allstate discharged all of its employee agents, “regardless of age, productivity, or performance.”⁴² Allstate offered the employees four options, the first two creating independent contractor relationships, the third granting a year’s pay as severance, and the fourth offering a severance pay-out for up to thirteen weeks’ salary.⁴³ Isbell, who opted for a thirteen-week severance pay-out,⁴⁴ later sued Allstate, alleging (among other claims) discrimination under the ADEA.⁴⁵ Following entry of summary judgment for Allstate, she took her claims to the Seventh Circuit.⁴⁶

Judge Manion, writing for the court, found that Isbell’s ADEA claim lacked merit. To prove discrimination, Isbell attempted to produce circumstantial evidence of discriminatory intent. Specifically, she pointed to studies conducted by Allstate (or its consultants) that suggested independent contractors outperform employee agents.⁴⁷ These studies—shared with company executives and

37. *Id.* at 247-48 (O’Connor, J., concurring).

38. *Id.* at 248 (citing 29 U.S.C. § 623(a) (2000)).

39. *Id.* at 249 (citation omitted).

40. 418 F.3d 788 (7th Cir.), *reh’g en banc denied* (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1590 (2006).

41. *Id.* at 790-91.

42. *Id.* at 791.

43. *Id.*

44. *Id.* at 792.

45. *Id.*

46. *Id.*

47. *Id.* at 794.

foreshadowing the company's reorganization—also revealed the distribution of agents by tenure and age, and noted “a potential generational mismatch between [Allstate's] agents and the new customers” it seeks.⁴⁸ One noted that “[p]roductivity declines slightly by . . . age,” but concluded that “[p]roduction by agent type remains constant” across age cohorts.⁴⁹ A second study “highlighted the age distribution of the Company's agents and explored the options for eliminating the employee-agent role in the agent workforce.”⁵⁰ The study also noted that younger agents produced “slightly more new business,” though found a weak relationship between age and production overall.⁵¹

This circumstantial evidence did not, according to the court, satisfy Isbell's burden to provide “a ‘convincing mosaic’ from which a jury could infer discriminatory intent on the part of Allstate.”⁵² The court found significant Isbell's failure to produce evidence that decision-makers relied on the studies when adopting the plan.⁵³ Further, Isbell's theory not only disregarded the termination of employees *regardless of age*, but that Allstate offered to hire them as independent contractors *regardless of age*.⁵⁴ Without hesitation, the court affirmed the district court judgment.

*Olson v. Northern FS, Inc.*⁵⁵ examined the intersection of direct and indirect methods of proof. The case arose from Northern FS's decision to hire twenty-two-year-old Jacob Bloome to replace veteran salesman Chuck Olson.⁵⁶ Olson had variously sold crop products and grain buildings for Northern FS until it stopped selling buildings in 2000.⁵⁷ In August, Steve Keelan met with Olson about his future with the company, and allegedly told Olson that he was undesirable in the business world because of his age.⁵⁸ At Keelan's request, Olson and another employee subsequently occupied what Northern FS described as a “temporary” crop sales position.⁵⁹ But when Northern FS hired Bloome, Keelan moved Olson back to the warehouse. Eleven days later, and following Olson's rejection of a truck-driving position based on eye problems, Northern FS terminated his employment.⁶⁰ He “was 59 years old, and had spent 41 years with Northern FS and its predecessors.”⁶¹

Reviewing summary judgment for Northern FS, Judge Evans explained that

48. *Id.*

49. *Id.*

50. *Id.* at 795.

51. *Id.*

52. *Id.* (internal quotation marks and citation omitted).

53. *Id.*

54. *Id.*

55. 387 F.3d 632 (7th Cir. 2004).

56. *Id.* at 634.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

Olson could prove discrimination by two methods: he could present direct or circumstantial evidence that an employer treated him adversely because of his age, which he labels the “direct method”; or he could present “a convincing mosaic” of circumstantial evidence of discriminatory intent, a method he labels “indirect.”⁶² Taking the direct method first, Judge Evans agreed with the district court that Keelan’s age comments—made five months before the discharge and outside the context of the discharge decision—were a “stray remark.”⁶³ The comments were too remote, therefore, to qualify as “direct” evidence of discrimination.⁶⁴

Judge Evans moved on, however, to reject the district court’s finding that Olson could not state a *prima facie* case of discrimination under the *McDonnell Douglas*, or indirect method.⁶⁵ The parties agreed that the fifty-nine-year-old Olson belonged to a protected class, that he met Northern FS’s legitimate job expectations, and suffered an adverse job action.⁶⁶ But Northern FS argued, and the district court accepted, that Olson and Bloome were not similarly situated because they had different academic credentials.⁶⁷ The panel found this application of *McDonnell Douglas* too rigid.⁶⁸ Citing other Seventh Circuit decisions, the court re-formulated the *prima facie* case to require (instead of the original fourth prong) only that the employer “hired someone else who was substantially younger or other such evidence that indicates that it is more likely than not that his age . . . was the reason for the discharge.”⁶⁹ The court concluded Olson satisfied his *prima facie* burden.⁷⁰

In the final stage of this analysis, Judge Evans faulted the district court’s conclusion that Olson lacked evidence of pretext, i.e., evidence that the company’s stated reason for his discharge was not the real one.⁷¹ Northern FS had claimed ignorance, explaining that Keelan knew nothing about Olson’s desire for a permanent crop salesman position. But Judge Evans returned to Keelan’s age-related comments. He noted that even if “stray remarks,” these

62. *Id.* at 635.

63. *Id.*

64. *Id.*

65.

[T]o establish a *prima facie* case of employment discrimination under the indirect method, a plaintiff must show: (1) he was a member of a protected class; (2) he was meeting his employer’s legitimate job expectations; (3) he suffered an adverse employment action; and (4) similarly situated employees not in the protected class were treated more favorably.

Id. (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 635-36 (quoting *Robin v. Espo Eng’g Corp.*, 200 F.3d 1081, 1089-91 (7th Cir. 2000)).

70. *Id.* at 636.

71. *Id.*

comments should have been considered in examining Olson's claims of pretext.⁷² Together with "Northern FS's unusual decision to hire someone with no sales experience to replace an experienced, highly successful salesman,"⁷³ the court found this evidence sufficient to support a reasonable inference that Keelan's explanation was pretextual.⁷⁴ Olson's case, concluded the court, merited a trial.⁷⁵

II. TITLE IX

Title IX of the Education Amendments of 1972⁷⁶ prohibits recipients of federal education funding from discriminating based on sex.⁷⁷ Over twenty years ago, the Supreme Court held that Title IX implies a private right of action.⁷⁸ Subsequent decisions have delineated that right, holding that Title IX: (1) allows private parties to seek monetary damages for intentional violations of Title IX,⁷⁹ (2) prohibits "deliberate indifference" to sexual harassment of a student by a teacher,⁸⁰ and (3) bars student-to-student sexual harassment.⁸¹ Earlier this survey term, the Court held that Title IX prohibits retaliation as well.⁸²

*Jackson v. Birmingham Board of Education*⁸³ examines the plight of Roderick Jackson, a physical education teacher and girl's basketball coach for the Birmingham, Alabama school district. Shortly after complaining that the girls' team at his school "was not receiving equal funding and equal access to athletic equipment and facilities,"⁸⁴ Jackson began receiving negative work evaluations, and he was removed as the girls' coach in May of 2001. Jackson filed suit alleging retaliation in violation of Title IX; the district court dismissed the claim, and the Eleventh Circuit affirmed.⁸⁵

With the aid of syllogism, Justice O'Connor disagreed with the interpretation of the Eleventh Circuit. Title IX "prohibits a funding recipient from subjecting

72. *Id.*

73. *Id.* The opinion cited the Supreme Court's clarification in *Reeves*, that "the trier of fact may still consider the evidence establishing the plaintiff's prima facie case, and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000) (internal quotation marks and citation omitted).

74. *Id.*

75. *Id.*

76. Pub. L. No. 92-318, 86 Stat. 373, *as amended*, 20 U.S.C. §§ 1681-1688 (2000).

77. *See* 20 U.S.C. § 1681(a) (2000).

78. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690-93 (1979).

79. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992).

80. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290-91 (1998).

81. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642 (1999).

82. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005).

83. *Id.*

84. *Id.* at 171.

85. *Id.* at 172.

any person to ‘discrimination’ ‘on the basis of sex,’” she wrote for the majority.⁸⁶ Retaliation, she continued, is a form of discrimination.⁸⁷ And because it is “an intentional response” to an allegation of sex discrimination, it is “on the basis of sex.”⁸⁸ The Court concluded that, “when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional ‘discrimination’ ‘on the basis of sex,’ in violation of Title IX.”⁸⁹

In holding retaliation actionable, the majority emphasized that reporting is “integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished.”⁹⁰ The Court also rejected the School Board’s lack of notice defense.⁹¹ To the contrary, it found that, “funding recipients have been on notice that they could be subjected to private suits for intentional sex discrimination under Title IX since 1979.”⁹²

Justice Thomas dissented, along with Chief Justice Rehnquist and Justices Scalia and Kennedy. Thomas maintained that the ordinary and natural meaning of Title IX’s prohibition of discrimination “on the basis of sex” means discrimination “on the basis of the plaintiff’s sex, not the sex of some other person.”⁹³ The dissent stated that, “at bottom . . . retaliation is a claim that aids in enforcing another separate and distinct right” and “[t]o describe retaliation as discrimination on the basis of sex is to conflate the enforcement mechanism with the right itself.”⁹⁴

Though *Jackson*, like *Smith*, widens the class of *potential* plaintiffs making federal discrimination claims, its practical consequences are harder to assess. Employers who properly document employee performance deficiencies may register little effect of this re-minted claim.

III. TITLE VII

A. *When Is Sex Discrimination Based on Sex?*

Title VII of the Civil Rights Act of 1964⁹⁵ makes it unlawful for employers to discriminate “because of . . . sex.” Historically, courts divided sexual harassment cases into two categories: 1) *quid pro quo* cases, where submission to a sexual demand is a condition of employment,⁹⁶ and 2) hostile environment

86. *Id.* at 173 (quoting 20 U.S.C. § 1681 (2000)).

87. *Id.* at 173-74.

88. *Id.* at 174.

89. *Id.*

90. *Id.* at 180.

91. *Id.* at 182.

92. *Id.* (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690-93 (1979)).

93. *Id.* at 185 (Thomas, J., dissenting).

94. *Id.* at 189.

95. 42 U.S.C. §§ 2000e to 2000e-17 (2000).

96. *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977), is the landmark decision on this form of harassment.

cases, where verbal or physical conduct unreasonably interferes with the employee's work environment.⁹⁷ In both categories, sexual conduct typically supplied the "based on sex" element of discrimination. In other words, the *means* of discrimination supplied the *motive*. But as discrimination law developed, it became apparent that non-sexual conduct could be both harassing and based on sex.⁹⁸ Now, more than twenty-five years after Catherine MacKinnon published her influential book *Sexual Harassment of Working Women*,⁹⁹ courts and employers still struggle to determine when sexual harassment is discrimination "because of" or "based on" sex.

Several cases in the Seventh Circuit explored these issues during the survey year. In *Venezia v. Gottlieb Memorial Hospital, Inc.*,¹⁰⁰ the court examined sexual harassment claims by a husband and wife against the same employer.¹⁰¹ Frank and Leslie Venezia claim that each suffered sexual harassment and a hostile work environment at Gottlieb Memorial Hospital, Inc. Leslie began her work in December 1993, and served as Director of Child Care at the time of her resignation on July 12, 2002. Frank joined Memorial as a maintenance worker in November 2000, and resigned on October 24, 2002.

The district court had dismissed the Venezias' complaint as inactionable, relying on *Holman v. Indiana*.¹⁰² *Holman* addressed what has become a familiar specter in harassment law: the "equal opportunity harasser"—that is, an employee who harasses both sexes and so discriminates against neither.¹⁰³ In *Holman*, both husband and wife had alleged that the same supervisor made sexual advances toward each, and retaliated when those advances were refused.¹⁰⁴ Because the alleged discrimination fell equally on both sexes, the court concluded it could not be sex-based.¹⁰⁵ Consequently, *Holman* affirmed the Rule 12(b)(6) dismissal of the plaintiffs' complaint.¹⁰⁶

Distinguishing *Holman*, Judge Wood (writing for the panel) noted that the Venezia's claims involved different supervisors and different work settings.¹⁰⁷

97. The Supreme Court recognized hostile environment harassment as sex discrimination in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

98. Even early EEOC compliance manuals acknowledged that sex discrimination could encompass harassment by non-sexual means. See, e.g., EEOC COMPLIANCE MANUAL (CCH) § 615.6, at 3217 (1982).

99. CATHERINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

100. 421 F.3d 468 (7th Cir. 2005).

101. *Id.* at 469.

102. 211 F.3d 399 (7th Cir. 2000).

103. *Id.* at 400-01.

104. *Id.*

105. *Id.* at 403. *Holman* identifies the critical issue as "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.* (internal quotation marks and citation omitted).

106. *Id.* at 407.

107. *Venezia v. Gottlieb Mem. Hosp., Inc.*, 211 F.3d 399, 471 (7th Cir. 2005).

To exclude such claims, she concluded, would unjustifiably “exclude the possibility of a lawsuit by a husband and wife employed by the same large company, in which the wife reports to Supervisor A, who discriminates against women, and the husband reports to Supervisor B, who discriminates against men.”¹⁰⁸ The court held the Venezias had pled claims “sufficiently distinct that it was error to dismiss them.”¹⁰⁹

Beyond this clarification of “equal opportunity harassment,” the *Venezia* opinion demonstrates how little a Title VII plaintiff must allege to state a claim of discrimination “based on sex.” The defendant hospital had alternatively argued that the dismissal should be affirmed because the complaint failed to set out sufficient allegations to support a claim for relief.¹¹⁰ The court rejected this argument, finding that Frank had alleged “numerous instances of harassment that he claimed occurred ‘because of his sex.’”¹¹¹ And although it found Leslie’s claims a closer call, it held the allegation of harassment *directed solely at Leslie* sufficient to state a claim for relief.¹¹²

Notably, the specific allegations disclose no discernible connection between the harassment and Frank’s or Leslie’s sex. The harassment of Frank allegedly began with three anonymous notes claiming he got the maintenance job through his wife.¹¹³ Further harassment consisted of: 1) notes implying that his wife’s efforts to get him the job were sexual; 2) notes calling his friends “pigs”; 3) pictures of nude men left on his bulletin board; 4) crass inquiries from co-workers about his relationship with his wife; and use of profanity by a male supervisor who accused him of having a bad attitude; and 5) various hostile behavior from and shunning by co-workers.¹¹⁴ Although these allegations include potentially sexual *means* of harassment—the nude photographs, for example—they supply no sex-based motive. The photographs and personal questions do not suggest his co-workers resented Frank *because he is a man*. To the contrary, the notes object to nepotism; moreover, Frank’s supervisor was a man.

The allegations against Leslie also supply motives other than sex. Leslie Venezia alleged that: 1) Frank’s co-worker tried to force her to fire an employee she had just hired; 2) when Leslie refused, the co-worker told other employees she “sat on his lap, in the presence of” Frank to demean him; 3) a note to Frank included a reference linking her to a vulgar photograph of a female body; and 4) someone slashed her tires and those of an employee after they had complained about a theft of money from the employee’s desk.¹¹⁵ Again, some of the

108. *Id.*

109. *Id.*

110. *Id.* at 472.

111. *Id.*

112. *Id.* at 472-73 (conceding that some or all of the harassment could be unrelated to her sex but stating that it was too early to draw that conclusion).

113. *Id.* at 469.

114. *Id.* at 469-70.

115. *Id.* at 470.

harassment is sexual. But nothing connects that harassment to Leslie's sex, and the motive's alleged are sex-neutral (e.g., Leslie refused to terminate an employee or complained about theft).

That the Venezias' claims survived reflects the procedural posture of the case. Under Rule 12(b)(6), courts will not dismiss a complaint unless "no relief could be granted under any set of facts that could be proved consistent with the allegations."¹¹⁶ Moreover, in *Swierkiewicz v. Sorema N.A.*,¹¹⁷ the Supreme Court resolved a split in the circuits to hold that a plaintiff need not plead a prima facie case of discrimination to survive a motion to dismiss.¹¹⁸ Still, *Venezia* is notable in suggesting that "sexual" means of harassment continue to help plaintiffs satisfy the "based on sex" element of their claims.

By contrast, it was the separation of sexual means from motives that occupied the court in *Shafer v. Kal Kan Foods, Inc.*¹¹⁹ In this Title VII action, Thad Shafer alleged both that he had been sexually harassed by a male co-worker and that his employer, Kal Kan, had fired him in retaliation for complaining about the harassment. The circumstances of the alleged harassment are extreme—involving what Judge Easterbrook called, "four frightening encounters with Alan Dill, one of [Shafer's] co-workers" at Kal Kan.¹²⁰ In June 2001, Dill (who is apparently heterosexual) made an obscene remark about Shafer's "cheerleader ass," and pushed Shafer's head against him to mimic fellatio.¹²¹ A few weeks later, Dill grabbed Shafer's arm hard enough to make him think it might break, and coerced a motion that mimicked masturbation. The following month, Dill ripped a fist of hair from Shafer's chest while he stood in the locker room. And in August 2001, Dill bit Shafer's neck. While Dill's motives are not immediately clear, Judge Easterbrook inferred a "[design] to demonstrate physical domination."¹²²

The court easily disposed of Shafer's retaliation claim, affirming summary judgment where no evidence suggested the people who discharged Shafer knew about his harassment complaints.¹²³ The sexual harassment claim prompted a more interesting analysis. Judge Easterbrook initially rejected Shafer's sexual harassment claim on principles of agency.¹²⁴ Because Kal Kan had no reason to know of the harassment, because Shafer offered no evidence of an official complaint, and because no evidence suggested Kal Kan treated male and female complaints differently, the court rejected employer responsibility for Dill's

116. *Holman v. Indiana*, 211 F.3d 399, 402 (7th Cir. 2000) (quoting *Lewford v. Sullivan*, 105 F.3d 354, 356 (7th Cir. 1997)).

117. 534 U.S. 506, 510 (2002).

118. *Id.* at 515.

119. 417 F.3d 663, 666 (7th Cir. 2005).

120. *Id.* at 664.

121. *Id.* at 665.

122. *Id.*

123. *Id.*

124. *Id.* at 666.

conduct.¹²⁵

The opinion next addressed whether “Dill’s behavior was sex discrimination.”¹²⁶ Judge Easterbrook began this analysis by declaring Dill’s conduct infrequent—applying the Supreme Court’s definition of actionable harassment as sufficiently severe or pervasive to create an abusive working environment.¹²⁷ He then turned to “men at Kal-Kan,” whose working conditions were both “placid” and no worse than women’s.¹²⁸ Explaining the shift, Judge Easterbrook asserted that Dill abused Shafer for his weakness, not his sex.¹²⁹ “Shafer has not established that his encounters with Dill reflected more than personal animosity or juvenile behavior.”¹³⁰ Thus, when analyzing the severity of the alleged harassment,¹³¹ the court did not examine the severity of those four “frightening encounters” with Dill. Rather, Judge Easterbrook preemptively concluded that Kal Kan did nothing discriminatory in responding to the personal misconduct of one of its agents.

The court’s analysis is noteworthy in several respects. First, *Shafer* does not confuse sexual means with sex-based motives. Although Dill may have used sexual means to harass Shafer, Judge Easterbrook inferred no animus toward men, but only toward Shafer. Second, the court analyzed the severity/pervasiveness of harassment as applied to *all men*, rather than Shafer. Yet if applied to other forms of harassment, this approach would exclude as sex-based discrimination severe or pervasive sexual conduct/speech toward a single woman. Nor would it recognize traditional *quid pro quo* harassment as sex-based.

Outside the context of sexual harassment, the Seventh Circuit recently considered whether an adverse job action that resulted from romantic favoritism amounted to discrimination “based on sex.” In *Preston v. Wisconsin Health Fund*,¹³² Jay Preston alleged that his former employer, a teamsters health and welfare fund, discriminated on account of his sex when it replaced him as fund director with Linda Hamilton.¹³³ Specifically, Preston alleged that the fund’s decision-maker and chief executive officer, Bruce Trojak (another defendant in the case), favored Hamilton for personal reasons.¹³⁴ By the time defendants received summary judgment, deposition testimony had produced rumors of an affair, frequent dinners together, and after-dinner discussions at Trojak’s

125. *Id.*

126. *Id.*

127. *Id.*; see *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

128. *Vinson*, 477 U.S. at 67.

129. *Id.*

130. *Id.*

131. Judge Easterbrook acknowledged that “[e]ven brief episodes of unwelcome sexual contact can impose harms that meet the ‘severe’ part of the Supreme Court’s ‘severe or pervasive’ formula.” *Id.*

132. 397 F.3d 539 (7th Cir. 2005).

133. *Id.* at 540-41.

134. *Id.* at 541.

apartment.¹³⁵

The Seventh Circuit unequivocally rejected Preston's sex discrimination claim.¹³⁶ Writing for a unanimous panel, Judge Posner declared: "[a] male executive's romantically motivated favoritism toward a female subordinate is not sex discrimination even when it disadvantages a male competitor of the woman."¹³⁷ The opinion traces this holding to several principles. First, Judge Posner finds "[s]uch favoritism . . . not based on a belief that women are better workers, or otherwise deserve to be treated better, than men [but] is entirely consistent with the opposite opinion."¹³⁸ Second, the court reasoned that such favoritism has little effect on the workplace, "since the disadvantaged competitor is as likely to be another woman as a man—were Preston a woman, Trojak would still have fired her to make way for Hamilton."¹³⁹ Judge Posner concludes that, "[n]either in purpose nor in consequence can favoritism resulting from a personal relationship be equated to sex discrimination."¹⁴⁰

The "based on sex" analysis of *Preston*—like *Shafer's*—stands in some contrast with federal courts' long-standing recognition of harassment based on sexual attraction as discrimination. In the typical *quid pro quo* scenario, there is no necessary connection to any set of beliefs about "women" as a group. And sexual attraction has regularly supplied the *based on sex* element of such claims. But a critical difference remains. As Judge Posner points out, the *adverse* employment consequences of sexually-motivated favoritism are sex-neutral.¹⁴¹ Although sex may determine (as a minimal qualification) the "favorite," sex plays no role in choosing the victim of favoritism. For good reason, *Preston* firmly preempts this potential expansion of employer liability under Title VII.

B. Severe and Pervasive Sexual Harassment: When Is Too Much Enough?

In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court defined actionable harassment as that which is "sufficiently severe or pervasive, to alter the conditions of [the plaintiff's] employment and create an abusive working environment."¹⁴² Although *Shafer* never determined whether the four instances of physical abuse could (if based on sex) qualify as an objectively or subjectively hostile work environment,¹⁴³ the Seventh Circuit found cursing and foul language

135. *Id.*

136. *Id.* at 542.

137. *Id.* at 541.

138. *Id.*

139. *Id.*

140. *Id.*

141. *See id.*

142. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

143. *Compare Koelsch v. Beltone Elec. Corp.*, 46 F.3d 705, 706-08 (7th Cir. 1995) (finding allegations of two incidents, involving supervisor's rubbing of his bare foot against the plaintiff's leg and his grabbing her buttocks, respectively, insufficient to create hostile work environment under Title VII).

insufficient in *Racicot v. Wal-Mart Stores, Inc.*¹⁴⁴ Anne Racicot joined Wal-Mart in July 1999 as an “associate” in the seafood department.¹⁴⁵ According to Racicot, several ensuing incidents with co-workers Mike Condra and Dan Simpson created a hostile work environment based on her sex. Condra allegedly used foul language frequently in her presence. And Wal-Mart terminated Condra after a customer complained of hearing him call Racicot a “fucking bitch” (though Racicot did not hear the comment herself).¹⁴⁶ Simpson allegedly yelled at Racicot regularly, cursed in her presence, and called her a “son of a bitch” (and similar names).¹⁴⁷

To evaluate the objective hostility of this environment, the court set out to “consider all of the circumstances, including frequency and severity of the conduct, whether it is humiliating or physically threatening, and whether it unreasonably interferes with an employee’s work performance.”¹⁴⁸ Applying this standard, Judge Wood wasted little time in concluding that Racicot’s claims fell short. The “limited number of incidents” reflected, in the court’s view, “run of the mill uncouth behavior [rather] than an atmosphere permeated with discriminatory ridicule and insult.”¹⁴⁹ Finding the conduct less than an “objectively offensive work environment,” the court affirmed summary judgment in favor of Wal-Mart on Racicot’s sexual harassment claim.¹⁵⁰

Racicot registers no significant departure from previous Seventh Circuit analyses of hostile work environments. In *Wyninger v. New Venture Gear, Inc.*,¹⁵¹ a case decided last survey period, the court reiterated its position that to be actionable, a hostile work environment must be “hellish.”¹⁵² By contrast, “occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers would be neither pervasive nor offensive enough to be actionable.”¹⁵³ Thus, it was not mere vulgarity, but a “crude and shocking” solicitation of sex in conjunction with “a physically intimidating situation—a woman locked in a small room with three larger men, snickering at her refusal to discuss oral sex”—that *Wyninger* found potentially severe.¹⁵⁴

In another case decided this survey period, *Moser v. Indiana Department of*

144. 414 F.3d 675, 677-78 (7th Cir. 2005).

145. *Id.* at 676.

146. *Id.*

147. *Id.*

148. *Id.* at 677-78.

149. *Id.* at 678.

150. *Id.*

151. 361 F.3d 965 (7th Cir. 2004).

152. *Id.* at 977 (citation omitted).

153. *Id.*

154. *Id.*; *Rogers v. City of Chicago*, 320 F.3d 748, 750 (7th Cir. 2003) (finding that explicit sexual comments by a supervisor—comments including a compliment of the plaintiff’s breasts and request that she put paper in a tray so he could “watch her put it in”—were insufficiently severe to create an objectively hostile environment).

Corrections,¹⁵⁵ the plaintiff's sexual harassment allegations also fell short. In *Moser*, a female juvenile boot camp administrator complained about another employee's sexual speech. Specifically, she cited his speaking "down" to female employees, a reference to her "tits," comments about female job applicant's appearance, profanity, jokes, innuendo, and comments about the plaintiff's preference for good-looking men.¹⁵⁶ Preliminarily, the court noted that insofar as her allegations concerned "second-hand harassment"—that is, harassment not directed at or heard by Moser—that conduct (though relevant) was "less objectionable" than direct harassment.¹⁵⁷ It then found Moser's allegation's sufficient, only, to make a reasonable employee "uncomfortable."¹⁵⁸ Writing for the panel, Judge Ripple concluded that, "the handful of comments of a sexual nature [made] apparently in the context of headless jokes, as opposed to serious or threatening comments, simply does not rise to the level of harassment our court has held actionable."¹⁵⁹

C. Retaliation: Must a Plaintiff Show Adverse Action in Employment?

Title VII makes it unlawful for an employer to punish an employee for complaining about statutory violations.¹⁶⁰ Courts have allowed plaintiffs to prove retaliation through either direct evidence or the *McDonnell Douglas* burden-shifting method of proof.¹⁶¹ Under both methods, a plaintiff must generally show he has suffered an adverse employment action.¹⁶² Yet the questions of what constitutes an "adverse employment action," and whether the action must involve the plaintiff's *employment*, continue to occupy the courts. In this survey period, the Seventh Circuit offered a thorough examination of both.

In *Washington v. Illinois Department of Revenue*,¹⁶³ the court found that although Title VII's anti-retaliation provision prohibits only "material" discrimination, it reaches adverse actions *outside* the workplace.¹⁶⁴ The case involved a Department of Revenue executive secretary, Chrissie Washington, who worked according to a "flexible" 7 a.m. to 3 p.m. schedule to care for a disabled child.¹⁶⁵ After Washington filed a race discrimination charge against her employer, a senior manager demanded that she work from 9 a.m. to 5 p.m. When Washington refused, she was assigned to another secretarial position with a different supervisor, and forced to re-apply for flex time. This application was

155. 406 F.3d 895 (7th Cir. 2005).

156. *Id.* at 902.

157. *Id.* at 903.

158. *Id.*

159. *Id.* (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998)).

160. 42 U.S.C. § 2000e-3(a) (2000).

161. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

162. *See, e.g., Moser v. Ind. Dep't of Corr.*, 406 F.3d 895, 903 (7th Cir. 2005).

163. 420 F.3d 658 (7th Cir. 2005).

164. *Id.* at 661.

165. *Id.* at 659.

refused. Afterward, Washington used a variety of vacation and other benefits to accommodate her schedule, took a leave of absence, and ultimately returned to work for a supervisor who allowed her to leave at 3 p.m.¹⁶⁶

Writing for the panel, Judge Easterbrook began his analysis with Washington's contention that the anti-retaliation provision of Title VII, § 2000e-3(a), is significantly broader than Title VII's anti-discrimination provision, § 2000e-2(a), which solely addresses discrimination in the terms and conditions of employment.¹⁶⁷ He agreed in part. Surveying recent Seventh Circuit cases, Judge Easterbrook found that retaliation must be material, but could occur in or outside the workplace.¹⁶⁸ As examples of outside-the-workplace retaliation, he suggested: "The state's Department of Revenue might have audited Washington's tax returns in response to her complaint . . . or hired a private detective to search for" information that could pressure her to withdraw her complaint.¹⁶⁹

The principle that adverse actions can violate Title VII's anti-retaliation provision *without* affecting the terms and conditions of a plaintiff's employment did not prove necessary to resolve Washington's claims. It recognizes, however, a significant trend in this circuit. In *Firestine v. Parkview Health System, Inc.*,¹⁷⁰ another case decided during the survey period, the court noted that in challenging the plaintiff's prima facie case of retaliation, the defendant had addressed whether she "suffered an 'adverse *job* action.'"¹⁷¹ The court responded that "retaliatory conduct that can incur liability is not so limited in scope."¹⁷² In *Herrnreiter v. Chicago Housing Authority*,¹⁷³ Judge Posner similarly noted that retaliation need not "involve an adverse employment action" to be actionable, and inventoried Seventh Circuit precedent supporting this position.¹⁷⁴

In *Washington*, Judge Easterbrook further found that only *material* retaliation is actionable.¹⁷⁵ But having defined material adverse actions as those which would dissuade a "reasonable worker from making or supporting a charge of

166. *Id.*

167. *Id.*

168. *Id.* at 661.

169. *Id.*

170. 388 F.3d 229, 235 (7th Cir. 2004).

171. *Id.*

172. *Id.*

173. 315 F.3d 742 (7th Cir. 2002).

174. *Id.* at 745.

175. *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 660 (7th Cir. 2005). Because Title VII does not define discrimination, courts have consistently limited that term to *material* differences in treatment. *Id.* The opinion explains:

Courts have resisted the idea that federal law regulates matters of attitude or other small affairs of daily life [in part] . . . because almost every worker feels offended or aggrieved by many things that happen in the workplace, and sorting out which of these occurred because of [protected traits] would be an impossible task.

Id.

discrimination,” he added a subjective element to this determination. “Reasonable workers,” according to the court, could have vulnerabilities created by external or even subjective conditions.¹⁷⁶ An employer might know, moreover, “that a particular [employee] has a nervous condition or hearing problem that makes him miserable when exposed to music for extended periods.”¹⁷⁷ If that employer retaliates by subjecting the employee to constant Muzak, the retaliation could be material.¹⁷⁸ Thus, while conceding that withdrawing flex time would not materially affect “a normal employee,” the court found that Washington “was *not* a normal employee, [and her employer] knew it.”¹⁷⁹ Washington’s son and his medical condition created a vulnerability making regular hours “a materially adverse change *for her*, even though it would not have been for 99% of the staff.”¹⁸⁰ Consequently, “[a] jury could find that the Department set out to exploit a known vulnerability and did so in a way that caused a significant (and hence an actionable) loss.”¹⁸¹

The holding that Title VII’s anti-retaliation provision can prohibit adverse action material *only* to the plaintiff represents a potential expansion of employer liability. By comparison, in *Herrnreiter*, Judge Posner divided material adverse actions into three categories: 1) “[c]ases in which the employee’s compensation, fringe benefits, or other financial terms of employment are diminished”; 2) “[c]ases in which a nominally lateral transfer with no change in financial terms significantly reduces the employee’s career prospects. . . .”; and 3) “[c]ases in which the employee is not moved to a different job or the skill requirements of his present job altered, but the *conditions* in which he works are changed in a way that subjects him to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in his workplace environment”¹⁸² Where, however, the action involves a “purely subjective preference for one position over another,” Judge Posner has found no basis for “trundling out the heavy artillery of federal antidiscrimination law [lest] ‘every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.’”¹⁸³

It remains to be seen whether, or by how much, *Washington* will shrink the barrier against Judge Posner’s tide of trivial claims by chip-on-the-shoulder employees.¹⁸⁴ In the meantime, the Supreme Court is poised to decide if an

176. *Id.* at 662.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* And its practical effect was to cut her hours, and thus her salary, by twenty-five percent. *Id.*

181. *Id.* at 663.

182. *Herrnreiter v. Chicago Hous. Auth.*, 315 F.3d 742, 744-45 (7th Cir. 2002).

183. *Id.* at 745 (quoting *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996)).

184. In *Moser v. Indiana Department of Corrections*, 406 F.3d 895 (7th Cir. 2005), a case decided before *Washington*, the court applied a traditional “adverse employment action” analysis

employer may be liable for any adverse treatment “reasonably likely to deter” the plaintiff from engaging in protected activity or merely ultimate employment decisions.¹⁸⁵

D. Indirect Evidence and Summary Judgment: Does Desert Palace Matter?

In the unanimously-decided *Desert Palace, Inc. v. Costa*,¹⁸⁶ the Supreme Court held that a Title VII plaintiff needs no direct evidence of discrimination to receive a “mixed motive” jury instruction.¹⁸⁷ The “mixed-motive” instruction dates from the 1991 amendments to Title VII, which prevent an employer from defeating liability by showing it would have made the same decision even without an unlawful motive.¹⁸⁸ The instruction allows a jury to find liability if an employer’s decision was motivated by both lawful and unlawful reasons. The 1991 amendments do not address, however, whether a plaintiff can establish “mixed-motive” liability through circumstantial or only direct evidence. Following the amendments, many courts had required plaintiffs to supply “direct evidence” of discrimination to argue a mixed-motive case to the jury.¹⁸⁹ *Desert Palace* categorically rejected this heightened requirement.¹⁹⁰ But the Court did not comment on how—if at all—mixed motive analysis affects the burden-shifting framework of *McDonnell Douglas* on summary judgment.

Desert Palace was decided in 2003, and promptly called “potentially the biggest employment case of the year.”¹⁹¹ District courts in Iowa and Minnesota soon found that *Desert Palace* transforms all single-motive into mixed-motive cases, and replaced *McDonnell Douglas* burden-shifting with a single inquiry: is there a genuine issue of fact that a protected characteristic (e.g., sex, race,

to Rhonda Moser’s retaliation claim. Moser alleged that her employer transferred her to a new position in retaliation for complaints about sexual harassment by another employee. *Id.* at 903. Moser’s transfer did not change her title, salary or benefits. *Id.* at 904. Nevertheless, Moser contended that her duties diminished and she could no longer perform duties she enjoyed. *Id.* The court rejected her diminished duties argument as unsupported by evidence, and her “subjective preference for the former position” as failing (without additional evidence) to show an adverse action. *Id.* Turning, however, to Moser’s final claim that her employer’s discipline adversely affected her, the court found an issue of fact. Moser presented evidence that, “[t]he reality [was] that a discipline of any kind damages the reputation of an employee, and that [the] employee’s career opportunities . . . greatly diminish.” *Id.* The court found that viewed most favorably, this evidence may, “suggest a materially adverse employment action.” *Id.* It did not, however, help Moser, who failed to prove the third element (causation) of her prima facie case. *Id.*

185. *Burlington N. & Sante Fe Ry. v. White*, 126 S. Ct. (2005).

186. 539 U.S. 90 (2003).

187. *Id.* at 92.

188. 42 U.S.C. § 2002e-2(m) (2000).

189. *See, e.g., Gagnon v. Sprint Corp.*, 284 F.3d 839, 848 (8th Cir. 2002).

190. *Desert Palace*, 539 U.S. at 101.

191. Daily Labor Report, No. 138, *High Court’s Ruling in Mixed-Motive Case Did Not Clear Up Confusion, Attorneys Say* (July 18, 2003) (quoting management attorney Maurice Baskin).

religion) was a motivating factor in an adverse employment action?¹⁹² The opinion has registered only a modest effect in the higher courts. The Supreme Court has applied the *McDonnell Douglas* framework post-*Desert Palace*,¹⁹³ and the Eighth, Ninth, and Tenth Circuits continue to do so.¹⁹⁴ In this survey period, the Fifth Circuit weighed in with an intermediate view. In *Keelan v. Majesco Software, Inc.*,¹⁹⁵ the court held that *Desert Palace* does not affect the *McDonnell Douglas* scheme until the plaintiff has set out a prima facie case of discrimination, and the defendant has articulated a legitimate, non-discriminatory reason for its actions.¹⁹⁶ But whereas a plaintiff could previously survive only by pointing to evidence of “pretext,” the Fifth Circuit now permits plaintiffs to alternatively supply evidence that the defendant’s legitimate reason is mixed with a discriminatory one.¹⁹⁷

Like several others, the Seventh Circuit has yet to expressly analyze the relationship between *McDonnell Douglas* and *Desert Palace*. A few district courts within the circuit have recently commented that *Desert Palace* preserves the plaintiff’s burden to set out a prima facie case of discrimination.¹⁹⁸ More significantly, the appellate courts continue to apply unmodified *McDonnell Douglas* burden-shifting, even when analyzing “pretext,” to review the grant or denial of summary judgment. An informal survey of published summary judgment decisions under Title VII from October 2004 through early December 2005 confirmed this trend. Of the thirteen Seventh Circuit decisions reviewed, eight applied an unmodified pretext analysis under *McDonnell Douglas*. An additional five affirmed summary judgment based on a *McDonnell Douglas* analysis of the prima facie case. And none cited *Desert Palace*.

Despite early predictions, it appears unlikely the Seventh Circuit will reject *McDonnell Douglas* anytime soon. And for arguably good reason. *McDonnell Douglas* allows the plaintiff to raise a prima facie case of discrimination by pointing to “suspicious” circumstances, then asks the employer to articulate a legitimate explanation for its conduct, and mandates summary judgment unless the plaintiff can challenge that explanation. The controversy stems from an apparent conflict with mixed motives: if the presence of a legitimate reason does

192. See, e.g., *Dare v. Wal-Mart Stores*, 267 F. Supp.2d 987 (D. Minn. 2003); *Griffith v. City of Des Moines*, No. 4:01-CV-10537, 2003 WL 21976027 (S. D. Iowa July 3, 2003).

193. *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003).

194. See, e.g., *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1123 (9th Cir. 2004); *Peebles v. Potter*, 354 F.3d 761 (8th Cir. 2004); *Tesh v. U.S. Postal Serv.*, 349 F.3d 1270 (10th Cir. 2003); *Allen v. City of Pocahontas*, 340 F.3d 551, 558 n.5 (8th Cir. 2003).

195. 407 F.3d 332 (5th Cir.), *reh’g and reh’g en banc denied* (5th Cir. 2005).

196. *Id.* at 346.

197. Consistent with its earlier decisions, the Eighth Circuit held that *Desert Palace* did not affect summary judgment proceedings at all. *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011 (8th Cir. 2005).

198. See, e.g., *Chen v. Northwestern Univ.*, No. 03-C-3928, 2005 WL 388570, at *12 (N.D. Ill. Feb. 17, 2005); *Pruett v. The Columbia House Co.*, No. 2:02-CV-00224 RLY WT, 2005 WL 941675, at * 16 (S.D. Ind. Mar. 31, 2005).

not (in light of the 1991 Amendments) defeat a claim of intentional discrimination, how can failing to successfully challenge a legitimate reason defeat that claim on summary judgment? Alternatively, “if an employee can raise an inference of discrimination by satisfying the initial elements of a *prima facie* case, an employer may not necessarily escape liability altogether by offering an alternative explanation for its action.”¹⁹⁹

The indirect method itself, however, arguably accounts for mixed-motives. First, legitimate reasons can always co-exist with illegitimate ones, but that possibility does not create evidence of discrimination. Second, inferences must account for *all* the evidence. Thus, under *McDonnell Douglas*, it is ultimately the back-and-forth, rather than the *prima facie* case in isolation, that sustains an inference of discriminatory motive.²⁰⁰ Finally, facts that suggest the presence of additional, *illegitimate* reasons already demonstrate “pretext” under the *McDonnell Douglas* scheme. Thus, Seventh Circuit courts will find pretext where the proffered reason is insufficient, of itself, to explain the employer’s conduct.²⁰¹ And to the degree the inferential force of the *prima facie* case survives a defendant’s articulation of legitimate reasons, that case may suggest pretext as well.²⁰²

Whether justifiably or not, *Desert Palace* has not lived up to its billing. Two years later, it remains “business as usual” at summary judgment proceedings in the Seventh Circuit.

E. Direct Evidence of Discrimination: Single and Remote Remarks

During the survey period, the Seventh Circuit also published several notable decisions involving direct evidence of Title VII discrimination. In *Waite v. Board of Trustees of Illinois Community College District No. 508*,²⁰³ the court found that a single (and facially ambiguous) remark could support a national origin discrimination verdict under Title VII.²⁰⁴ A jury had awarded Paulette Waite, a Jamaican woman, \$15,000 on her national origin discrimination claim, and her employer challenged that award on appeal.²⁰⁵ Reviewing the record, the Seventh Circuit found sufficient evidence to support Waite’s *prima facie* burden,

199. *Thomas v. Chrysler Fin., LLC*, 278 F. Supp. 2d 922, 926 (N.D. Ill. 2003).

200. In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Supreme Court explained that whether a case should go to a jury will depend on factors including, “the strength of the plaintiff’s *prima facie* case, the probative value of the proof that the employer’s explanation is false, and any other evidence that supports the employer’s case and that properly may be considered on a motion for judgment as a matter of law.” *Id.* at 148-49.

201. *See, e.g., Hughes v. Brown*, 20 F.3d 745, 747 (7th Cir. 1994).

202. *See Reeves*, 530 U.S. at 143 (“[T]he trier of fact may still consider the evidence establishing the plaintiff’s *prima facie* case and inferences properly drawn therefrom . . . on the issue of whether the defendant’s explanation is pretextual.”).

203. 408 F.3d 339 (7th Cir. 2005).

204. *Id.* at 346.

205. *Id.* at 342, 346.

and to allow the jury to find the employer's "legitimate" reasons for her suspension pretextual. But that did not end the court's inquiry. Answering the defendant's claim that a jury cannot simply disbelieve the employer's explanation, but "must believe the plaintiff's explanation of intentional discrimination,"²⁰⁶ the court examined the only direct evidence of discriminatory intent: a supervisor's pre-disciplinary comment that Waite had shown a "plantation mentality."²⁰⁷ Waite testified at trial that this remark referred "to her national origin 'because it was usually said that Jamaicans in particular and Caribbean folks in general thought they were white and treated African-Americans like slaves.'"²⁰⁸ Noting that her supervisor (an African-American) could have refuted this interpretation, but did not do so, and that she recommended discipline because Waite had left work for her to do (as might reflect a plantation mentality), the court affirmed the verdict for Waite.²⁰⁹ The "jury was permitted to infer that this 'plantation mentality' remark was evidence of discriminatory animus."²¹⁰

In a second case, the Seventh Circuit clarified the admissibility of direct evidence of discrimination, reversing the trial court's grant of judgment as a matter of law following the plaintiff's presentation of his race discrimination case at trial. In *West v. Ortho-McNeil Pharmaceutical Corp.*,²¹¹ the district court barred Edward West from introducing eight racially offensive statements by his supervisor, Walter Pascale, as too remote in time from his allegedly discriminatory termination.²¹² Distinguishing time-barred *acts* from remote-in-time *evidence*, the Seventh Circuit explained:

On claims other than hostile work environment claims, acts outside the statutory time period cannot be the basis for liability, but the statute does not "bar an employee from using the prior acts as background evidence in support of a timely claim." . . . "[W]here, as here, the plaintiff timely alleged a discrete discriminatory act . . . acts outside of the statutory time frame may be used to support that claim."²¹³

Finding that the exclusion of remote remarks abused the district court's discretion, the appellate court vacated the judgment, and remanded the case for a new trial.²¹⁴

206. The court did not address why evidence of pretext was not, of itself, sufficient to support the jury verdict in this case.

207. *Id.* at 342, 344.

208. *Id.* at 342.

209. *Id.* at 346.

210. *Id.* at 344.

211. 405 F.3d 578 (7th Cir.), *reh'g denied* (7th Cir. 2005).

212. *Id.* at 579.

213. *Id.* at 581 (internal citations omitted).

214. *Id.* at 581-82.

F. Other: Procedural Holdings of Note

The Seventh Circuit addressed several procedural issues during the survey period. In *EEOC v. Caterpillar, Inc.*²¹⁵ the court held, on interlocutory appeal, that in examining whether claims in an EEOC complaint fell within the scope of discrimination discovered during an EEOC investigation, a court cannot review the EEOC's own determination on this issue.²¹⁶ As explained by Judge Posner, this ruling rests on the difference between private lawsuits and those filed by the EEOC.²¹⁷ Private parties must exhaust administrative remedies.²¹⁸ Consequently, they may not sue on allegations not reasonably connected to an administrative charge.²¹⁹ But "[t]hat is not an issue," writes Judge Posner, "when the EEOC itself is the plaintiff, which is why a suit by the EEOC is not confined to 'claims typified by those of the charging party.'"²²⁰ Rather, any violations identified during an EEOC investigation are actionable.²²¹ "[C]ourts may not limit a suit by the EEOC to claims made in the administrative charge, [and] they likewise have no business limiting the suit to claims that the court finds to be supported by the evidence obtained in the Commission's investigation."²²²

Another noteworthy decision is *Torry v. Northrop Grumman Corp.*,²²³ which addressed whether discovery can constructively amend the scope of a plaintiff's complaint. In her complaint, Nancy Torry solely alleged that her employer, Northrop, violated the Age Discrimination in Employment Act of 1967 ("ADEA").²²⁴ Torry subsequently sought to discover evidence of race discrimination, but never amended her complaint.²²⁵ Northrop argued that Torry's failure to amend her complaint barred her race discrimination claim.²²⁶ The district court rejected this argument and considered both claims, but granted summary judgment in favor of Northrop.²²⁷ On appeal, Northrop alternatively argued that the district court should never have reached the merits of Torry's race discrimination claim.²²⁸

Addressing this alternative argument, Judge Posner noted courts' reliance upon a "constructive amendment" doctrine, but turned to Federal Rule Civil

215. 409 F.3d 831 (7th Cir. 2005).

216. *Id.* at 833.

217. *Id.* at 832.

218. *Id.* at 832-33.

219. *Id.* at 833.

220. *Id.* (quoting *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 331 (1980)).

221. *Id.*

222. *Id.*

223. 399 F.3d 876 (7th Cir. 2005).

224. 29 U.S.C. §§ 621-634 (2000).

225. *Torry*, 399 F.3d at 877.

226. *Id.*

227. *Id.*

228. *Id.*

Procedure 15(b) instead.²²⁹ Under Rule 15(b), “when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.”²³⁰ Judge Posner likened “trial by consent” to pretrial orders as superseding all pleadings.²³¹ In this view, consensually tried issues do not amend the complaint, but instead make it irrelevant.²³² Accordingly, Judge Posner found the parties had consented by extensively “pre-trying” Torry’s race discrimination claim during discovery.²³³ Citing Rule 15(b), he deemed Northrop’s insistence that Torry formally amend her complaint “frivolous.”²³⁴

Judge Posner’s opinion sends clear warning that trial by consent includes “pretrial” without objection. The opinion says less, however, about what consensual “pretrial” of a claim requires. Northrop had acquiesced in “four years of discovery and other pretrial maneuverings without objecting to the fact that its opponent was patently engaged in endeavoring to prove racial as well as age discrimination.”²³⁵ Precisely when (during these four years) Northrop consented remains unclear. *Torry* appears, in any case, to extend circuit precedent. Several cases suggest a party can impliedly expand the scope of trial by briefing issues on summary judgment. For example, the defendant in *Ryan v. Illinois Department of Children & Family Services*,²³⁶ a case cited by *Torry*, implicitly consented to try equal protection claims by addressing those claims in its summary judgment briefing, and by allowing the court to incorporate them in its pretrial order.²³⁷ In *Walton v. Jennings Community Hospital, Inc.*,²³⁸ and *Whitaker v. T.J. Snow Co.*,²³⁹ the court also recognized that parties who join an issue in summary judgment proceedings impliedly consent to expand the plaintiff’s complaint.²⁴⁰ But a party’s implicit consent to try un-pled claims

229. *Id.* at 878.

230. *Id.* (quoting FED. R. CIV. P. 15(b)).

231. *Id.*

232. *Id.*

233. *Id.* at 879.

234. *Id.* Rule 15(b) provides that failure to amend “does not affect the result of the trial of” issues outside the pleadings.

235. *Id.*

236. 185 F.3d 751 (7th Cir. 1999).

237. *Id.* at 763.

238. 875 F.2d 1317, 1320 (7th Cir. 1989) (finding that where parties briefed and court ruled on tort-based theory on summary judgment, the complaint was amended beyond plaintiff’s original contract-based theory).

239. 151 F.3d 661, 663 (7th Cir. 1998) (holding that where parties “squarely addressed the strict liability theory in their summary judgment briefs, the complaint was constructively amended to include that claim”).

240. Elsewhere, the Seventh Circuit has warned that “the last minute assertion of such an issue into an answer to a motion for summary judgment does not constitute the trial of such an issue by express or implied consent within the meaning of Rule 15(b). *Practical Constr. Co. v. Granite City Hous. Auth.*, 416 F.2d 540, 543 (7th Cir. 1969).

before summary judgment appears rare. This case should alert litigants to the power of pre-motion discovery to expand a plaintiff's case.

IV. AMERICANS WITH DISABILITIES ACT

A. What Is a Disability?

1. *Actual Disability*.—To invoke the protections of the Americans with Disabilities Act (“ADA”), an employee must establish a physical or mental impairment that “substantially limits” a “major life activity.”²⁴¹ The “substantial limitation” requirement has been a subject of recent controversy. In 2002, the Supreme Court explained in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*²⁴² that, “[s]ubstantially” in the phrase ‘substantially limits’ suggests ‘considerable’ or ‘to a large degree.’²⁴³ The Court held that, “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.”²⁴⁴ Subsequently, the EEOC has insisted that *Toyota*’s use of the phrase “prevents or severely restricts” lacks precedential value because the Court “clearly did not and could not raise the statutory standard for disability.”²⁴⁵ Recently, the Seventh Circuit agreed and concluded in *EEOC v. Sears, Roebuck & Co.*²⁴⁶ that the Supreme Court did not intend to alter the ADA standard for determining “substantially limited.”²⁴⁷

Despite the Seventh Circuit’s alignment with the EEOC, the phrase “significantly limits” remains ambiguous, as *Sears* itself illustrates. In *Sears*, the court ultimately found that the plaintiff’s inability to “walk the equivalent of one city block without her right leg and feet becoming numb” *substantially limited* the major life activity of walking.²⁴⁸ It noted, however, her failure to provide evidence of distances she could walk, or how her abilities compared with average members of the population.²⁴⁹ Despite finding such objective evidence helpful, the court deemed “substantially limiting” a subjective determination that resisted summary judgment.²⁵⁰ At the same time, it urged employees to strongly consider using clear medical restrictions and statistical evidence to establish disability.

In *Branham v. Snow*,²⁵¹ the Seventh Circuit considered whether the plaintiff Gary Branham’s insulin-dependent diabetes substantially limited the major life

241. 42 U.S.C. § 12102(2)(A) (2000).

242. 534 U.S. 184 (2002).

243. *Id.* at 196.

244. *Id.* at 198.

245. EEOC Brief, *EEOC v. United Parcel Service, Inc.*, 311 F.3d 1132 (9th Cir. 2002).

246. 417 F.3d 789 (7th Cir. 2005).

247. *Id.* at 799-800.

248. *Id.* at 802.

249. *Id.* at 795.

250. *Id.* at 808.

251. 392 F.3d 896 (7th Cir. 2004), *reh’g denied* (7th Cir. 2005).

activity of eating. The court noted that Branham had to regulate his eating significantly to avoid mild and severe reactions to insulin.²⁵² Branham would have to “respond, with significant precision, to the blood sugar readings he takes four times a day.”²⁵³ Branham’s strict observance of these daily procedures, concluded the court, substantially limited his “eating,” thus qualifying him as disabled under the ADA.²⁵⁴

The court addressed another aspect of disability—its requisite longevity—in *Hopkins v. Godfather’s Pizza, Inc.*²⁵⁵ In *Toyota*, the Supreme Court held that an impairment must be “permanent or long-term” to be covered under the ADA.²⁵⁶ The Seventh Circuit applied this requirement in *Hopkins*, in which an employee’s injured hand healed sufficiently for him to return to work within a month.²⁵⁷ The court found the injury’s “impact . . . neither permanent or long term,” and thus insufficient to “constitute a disability under the ADA.”²⁵⁸

A final issue addressed during the survey period is whether “substantial limitation” accounts for an employee’s ability to perform a major life activity with help. In *Sutton v. United Air Lines, Inc.*,²⁵⁹ the Supreme Court held that if a plaintiff uses measures “to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is ‘substantially limited’ in a major life activity.”²⁶⁰ *Casey v. Kwik Trip, Inc.*²⁶¹ applied this principle to housework aids. The plaintiff admitted that adaptive tools and techniques allowed her to grip and manipulate objects, and thus complete household tasks. Based on these admissions, the Seventh Circuit found she was not substantially limited in performing household chores.²⁶²

2. “Regarded as” Disability.—Under the ADA, “disability” includes not only substantially limiting physical and mental impairments, but the condition of being “regarded as” having them.²⁶³ To make out a *prima facie* case of “regarded as” discrimination, a plaintiff must show that his employer believed him to be

252. *Id.* at 903.

253. *Id.*

254. *Id.* at 904.

255. 141 F. App’x 473 (7th Cir.) (unpublished order), *reh’g and reh’g en banc denied* (7th Cir. 2005), *cert. denied*, 74 U.S.L.W. 3532 (U.S. May 15, 2006) (No. 05-1153).

256. *Toyota*, 534 U.S. at 192.

257. *Hopkins*, 141 F. App’x at 475.

258. *Id.* at 476. By comparison, the EEOC finds that impairments of several months’ duration are not short term. EEOC COMPLIANCE MANUAL (CCH) § 902.4(d), at 30 (2000), *available at* <http://www.eeoc.gov/policy/docs/902cm.html>.

259. 527 U.S. 471 (1999).

260. *Id.* at 482.

261. 114 Fed. App’x 215 (7th Cir. 2004) (unpublished order).

262. *Id.* at 219. Additionally, Casey had claimed a substantial limitation in the major life activity of working—a claim the court rejected as inconsistent with her alleged ability to perform her job. *Id.* at 220.

263. 42 U.S.C. § 12102(2)(A) (2000).

substantially limited in a “major life activity.”²⁶⁴ In *Nese v. Jullian Nordic Construction Co.*,²⁶⁵ the employee attempted to satisfy this requirement with evidence that his employer intentionally altered his evaluation form.²⁶⁶ The Seventh Circuit was not persuaded, concluding that an employer’s false justification of an action to an employee does not make the employer guilty of discrimination.²⁶⁷

In *Kupstas v. City of Greenwood*,²⁶⁸ the court distinguished an employer’s belief the employee could not work from the belief he could not perform a particular job.²⁶⁹ The evidence on summary judgment showed that his employer believed Rodney Kupstas, a truck driver and laborer, could not shovel for more than four hours a day or lift more than sixty pounds.²⁷⁰ The court nevertheless held that “Kupstas’s failure to provide evidence as to a class or range of jobs for which he otherwise was qualified, and from which [the employer] perceived him to be excluded, [was] fatal to his case.”²⁷¹ Nor could Kupstas cure this insufficiency by arguing that certain job modifications implied that his employer considered him disabled.²⁷² The court noted that although “a jury could infer that an employer offered an accommodation because of some perceived impairment, the plaintiff still must demonstrate that the perceived impairment is one that would substantially limit a major life activity.”²⁷³ This, however, Kupstas had failed to do.

3. “Record of” Disability.—Disability, under the ADA, also includes having a “record of” a substantially limiting impairment.²⁷⁴ Comparatively rare, “record of” discrimination claims involve plaintiffs with histories or classifications of disability. A persisting question has been whether a “record of” disability includes conditions that do not amount to a substantially limiting impairment. The EEOC has taken the position that such claims are not actionable.²⁷⁵ In *Rooney v. Koch Air, LLC*,²⁷⁶ the Seventh Circuit followed suit.²⁷⁷ The court thus rejected the employee’s “record of” claim, holding that evidence that an employer knew about an employee’s medical history did not establish a record

264. *Id.*

265. 405 F.3d 638 (7th Cir.), *cert. denied*, 126 S. Ct. 623 (2005).

266. *Id.* at 640.

267. *Id.* at 642.

268. 398 F.3d 609 (7th Cir. 2005).

269. *Id.* at 614.

270. *Id.* at 613.

271. *Id.* at 614.

272. *Id.*

273. *Id.*

274. 42 U.S.C. § 12102(2)(B), (C) (2000).

275. EEOC COMPLIANCE MANUAL (CCH) § 902.7, at 40-41 (2000), *available at* <http://www.eeoc.gov/policy/docs/902cm.html>.

276. 410 F.3d 376 (7th Cir. 2005).

277. *See id.* at 381.

of any substantially limiting impairment.²⁷⁸

B. Essential Job Functions: When Is a Disabled Individual “Qualified”?

The ADA protects only “qualified” individuals with a disability. Thus, to show disability discrimination, an employee must show that she can perform—with or without reasonable accommodation—the essential functions of her job.²⁷⁹ A recurring issue in disability cases is whether particular job functions are essential. The Seventh Circuit addressed this issue in *Rooney*, finding “performing job-site visits” an essential function of an Assistant Customer Assurance Manager position.²⁸⁰ In doing so, it placed significant weight on the employee’s written job description, which included tasks requiring such visits, and on the time spent performing such tasks.²⁸¹ Notably, the EEOC also finds the employer’s judgment, written job descriptions, and time spent on performing functions relevant in separating marginal from essential job functions.²⁸²

When assessing the ability to perform essential job functions, the Seventh Circuit continued to find insubordinate employees beyond the reach of ADA protection. In *Hammel v. Eau Galle Cheese Factory*,²⁸³ a disabled employee could not show he could perform essential functions where he acted irresponsibly, “failed to follow or comply with company rules and policies and continued to make personal phone calls on work time and take unauthorized cigarette breaks.”²⁸⁴ The ADA, concluded the court, does not “protect an employee who is insubordinate and refuses to obey and accept direct orders from his supervisors.”²⁸⁵

C. Accommodating Disability: What Is Reasonable?

Pivotal to many ADA analyses is whether a reasonable accommodation would allow an employee to perform essential job functions, and which accommodations qualify as “reasonable.” The Seventh Circuit addressed the “reasonableness” of potential accommodations in two cases decided during the

278. *Id.*

279. 29 C.F.R. § 1630.2(n)(3) (2005); *Basith v. Cook County*, 241 F.3d 919, 927 (7th Cir. 2001).

280. *Rooney*, 410 F.3d at 382.

281. *Id.*

282. 29 C.F.R. § 1630.2(n), also citing the consequences of not performing the function, the terms of a collective bargaining agreement, and the experience of past and present employees performing the job as potentially relevant. *But cf. Zieba v. Showboat Marina Casino P’ship*, 361 F. Supp. 2d 838, 843 (7th Cir. 2005) (finding the ability to concentrate potentially inessential to the job of bartender).

283. 407 F.3d 852 (7th Cir.), *reh’g en banc denied* (7th Cir.), *cert. denied*, 126 S. Ct. 746 (2005).

284. *Id.* at 863.

285. *Id.*

survey period. In *Zieba v. Showboat Marina Casino Partnership*,²⁸⁶ the court held that an employer may be required to accommodate an employee's request for an open-ended schedule.²⁸⁷ Although such requests are often found unreasonable, the court determined that shorter shifts with definite start and finish times could bring them within the employer's accommodation duty.²⁸⁸ Conversely, though courts generally find reasonable accommodations to include re-assignment, the Seventh Circuit recently held that an employer owed no duty to grant an employee's request to change supervisors in *Bradford v. City of Chicago*.²⁸⁹ Ricardo Bradford alleged that working with a particular supervisor worsened his stress-related medical condition, and requested a transfer as "medically necessary."²⁹⁰ The court rejected this accommodation as unreasonable, finding that the discretion to assign supervisors squarely resides with the employer.²⁹¹ The court relied on *Weiler v. Household Finance Corp.*,²⁹² which reasoned: "In effect, [the employee] asks us to allow her to establish the conditions of her employment, most notably, who will supervise her. Nothing in the ADA allows this shift in responsibility."²⁹³

D. Prohibited "Medical Examinations" Under the ADA

In a decision employers should note, the Seventh Circuit held that a test used by an employer to measure personality traits was a prohibited "medical examination" under the ADA.²⁹⁴ In *Karraker v. Rent-a-Center, Inc.*,²⁹⁵ Rent-a-Center required employees seeking management positions to take a test designed to assess personality traits, such as an employee's ability to function in a fast-paced environment.²⁹⁶ The same test, however, could also measure traits related to mental illness (e.g., depression, paranoia, hysteria).²⁹⁷ Because the test was designed—at least in part—to disclose mental disorders, the court found it a "medical examination" under the ADA.²⁹⁸ Regardless of whether Rent-a-Center used the test merely to measure personality traits, it operated to "exclud[e] employees with disorders from promotions."²⁹⁹

286. *Zieba*, 361 F. Supp. 2d 838.

287. *Id.* at 842-43.

288. *Id.*

289. *Bradford v. City of Chicago*, 121 F. App'x 137, 140 (7th Cir. 2005) (unpublished order).

290. *Id.*

291. *Id.*

292. *Id.*; 101 F.3d 519 (7th Cir. 1996).

293. *Weiler*, 101 F.3d at 526.

294. 42 U.S.C. § 12112(d)(1) (2000).

295. 411 F.3d 831 (7th Cir. 2005).

296. *Id.* at 833.

297. *Id.* at 833-34.

298. *Id.* at 837.

299. *Id.* at 836-37.

E. Judicial Estoppel

The Seventh Circuit has previously found that applying for Social Security Disability Benefits does not necessarily forfeit an employee's ADA claim, but requires explanation:

A plaintiff may declare that she was totally disabled in her SSDI application, then declare that she was a qualified individual under the ADA, but she must show that this apparent inconsistency can be resolved with reference to variance between the definitions of "disability" contemplated by the ADA and SSDI. Thus, "a plaintiff's sworn assertion in an application for disability benefits that she is, for example, 'unable to work' will appear to negate an essential element of her ADA case—at least if she does not offer a sufficient explanation."³⁰⁰

The Seventh Circuit recently applied this analysis in *Opsteen v. Keller Structures, Inc.*³⁰¹ In the course of seeking social security and ERISA benefits, Christopher Opsteen represented that he could not work with or without accommodation, and provided corroborating medical evaluations.³⁰² Reviewing his ADA claim, the court noted that Opsteen offered no explanation for what amounted to irreconcilable positions, and concluded that Opsteen was judicially estopped from showing he could perform the essential functions of his job.³⁰³

V. FAMILY MEDICAL LEAVE ACT

The Family and Medical Leave Act of 1993 ("FMLA") allows an employee up to twelve weeks of unpaid leave for serious health conditions that prevent her from performing her job.³⁰⁴ Courts in this circuit addressed both leave eligibility and return-to-work requirements during the survey year.

A. The 1250 Requirement Must Be Met Annually

Under the FMLA, an employee is entitled to twelve weeks of unpaid leave per twelve month period, but only if he has been employed "for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave."³⁰⁵ Recently, the U.S. District Court for the Northern District of Indiana examined whether the 1250 hour requirement is a one-time-only determination. In *Sills v. Bendix Commercial Vehicle Systems LLC*,³⁰⁶ the employee contended that "once she met the initial eligibility

300. *Feldman v. Am. Mem'l Life Ins. Co.*, 196 F.3d 783, 791 (7th Cir. 1999) (quoting *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805 (1999)).

301. 408 F.3d 390 (7th Cir. 2005).

302. *Id.* at 391.

303. *Id.* at 392.

304. 29 C.F.R. § 825.102 (2005).

305. 29 U.S.C. § 2612(a)(1) (2000); 29 C.F.R. § 825.110(a)(2).

306. *Sills v. Bendix Commercial Vehicle Sys. LLC*, No. Civ. 1:04-CV-149, 2005 WL

requirements to take FMLA . . . it was unlawful for her employer to discontinue her FMLA leave if she did not meet the 1,250 hour requirement annually.”³⁰⁷ The court rejected this position, holding that the employee must have worked at least 1250 hours the year prior to every twelve-month period in which she seeks leave.³⁰⁸

*B. Collective Bargaining Agreement Can Heighten
Return-to-Work Requirements*

In *Harrell v. United States Postal Service*,³⁰⁹ the postal service denied reinstatement to an employee who had been released to return to work by his medical doctor based on conditions imposed not by the FMLA but postal regulations.³¹⁰ Rejecting Mr. Harrell’s challenge under the FMLA, the district court determined that postal regulations had the force of a valid collective bargaining agreement and they, rather than the FMLA, controlled his right to reinstatement.³¹¹

Mr. Harrell’s claim was temporarily revived on appeal. A unanimous panel held that a collective bargaining agreement could not impose greater return-to-work requirements than the FMLA.³¹² It concluded that test requirements “impose a greater burden on the employee and therefore cannot be employed, consistent with § 2652, in implementing the return-to-work provisions of the FMLA.”³¹³

On rehearing, however, the court reversed course. Finding that “Congress did not clearly address[] the question at issue through the statutory language,”³¹⁴ the panel deferred to a “reasonable interpretation” contained in Department of Labor regulations.³¹⁵ Specifically, the court looked to 29 C.F.R. § 825.310(b), providing: “*If State or local law or the terms of a collective bargaining agreement govern an employee’s return to work, those provisions shall apply.*”³¹⁶ This subsection, according to the court, “not only provides for compliance with a CBA, it also indicates that the CBA may impose more stringent return-to-work requirements on the employee than those set forth in the statute.”³¹⁷ The judgment of the district court was therefore affirmed.

2674926, *8 (N.D. Ind. Oct. 20, 2005).

307. *Id.* at *6.

308. *Id.* at *7.

309. 415 F.3d 700 (7th Cir. 2005), *modified on reh’g*, 445 F.3d 913 (7th Cir. 2006).

310. He failed to supply certain information and to undergo an employer medical examination.

311. *Harrell v. U.S. Postal Serv.*, 445 F.3d 913, 917 (7th Cir. 2006).

312. *Harrell*, 415 F.3d at 713-14.

313. *Id.* at 713.

314. *Harrell*, 445 F.3d at 925.

315. *Id.*

316. *Id.* (emphasis added).

317. *Id.*

VI. FEDERAL LABOR STANDARDS ACT

Under the Equal Pay Act (“EPA”) amendment to the Fair Labor Standards Act of 1938,³¹⁸ an employer cannot discriminate by paying wages to one sex at a lesser rate than paid to the other sex “for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”³¹⁹ The Seventh Circuit examined whether the EPA prohibits a common employer practice—paying “new hires” at least as much as they previously earned—in *Wernsing v. Department of Human Services*.³²⁰

Jenny Wernsing brought an EPA claim against her employer, arguing that it discriminated against her by paying her less than a man recently hired in the same position.³²¹ The court began its analysis by observing that the EPA only forbids pay differences “based on sex,” and “exempt[s] any pay differential based on any other factor other than sex.”³²² Applying this exemption, it found “wages at one’s prior employer” to be a “factor other than sex.”³²³ *Wernsing* rejected, moreover, the view of four other circuits that former wages are a “factor other than sex only if the employer has an ‘acceptable business reason’ for setting the employees’ starting pay in this fashion.”³²⁴ Writing for the panel, Judge Easterbrook asserted that the EPA, “asks whether the employer has a reason other than sex—not whether it has a ‘good’ reason.”³²⁵ He also rejected Wernsing’s argument that because women earn less than men, market wages must be ignored as discriminatory.³²⁶ Although conceding that wage patterns for some jobs might reflect discrimination, the court found no such evidence in the summary judgment record.³²⁷ Lacking evidence of discrimination, Wernsing was not entitled to a trial.³²⁸

VII. EQUAL PROTECTION

The Seventh Circuit issued two significant equal protection decisions during the survey period. In *Nanda v. Moss*,³²⁹ the court denied qualified immunity to a medical school dean who acquiesced in a professor’s termination *knowing* that her supervisor might have had a discriminatory motive, and knowing that proper

318. 29 U.S.C. § 206(d) (2000).

319. *Id.*

320. 427 F.3d 466, 467 (7th Cir. 2005).

321. *Id.*

322. *Id.* at 468 (quoting 29 U.S.C. §206(d) (2000)).

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.* at 470.

327. *Id.*

328. *Id.* at 471.

329. 412 F.3d 836 (7th Cir. 2005).

procedures had been disregarded.³³⁰ Navreet Nanda, a “woman of Asian and Indian descent, accepted a tenure track position” with the University of Illinois as a professor in the college of medicine.³³¹ A new department head subsequently recommended to the dean that Nanda be dismissed, and the dean made that recommendation to the board of trustees which terminated her contract. This process excluded the faculty advisory committee, which had participated in all prior contract terminations.³³² The dean, moreover, had received faculty letters protesting the termination as discriminatory and knew that another female professor had complained of harassment by the department head.³³³ Nanda sued the dean, among others, alleging that he violated her equal protection rights based on sex and ethnicity under 42 U.S.C. § 1983. The dean moved for summary judgment, claiming qualified immunity as a government official.³³⁴ The district court denied his motion.

Affirming the denial of summary judgment, the Seventh Circuit rejected the dean’s argument that he was “merely negligent, but not deliberately indifferent, in failing to follow up on the complaints, concerns and allegations levied against [the department head].”³³⁵ To the contrary, the court noted that the dean had ignored Nanda’s complaints, the complaints of other faculty members, the recommendation of the faculty advisory committee, and allegations of harassment against the department head.³³⁶ It similarly characterized the dean’s post-recommendation appointment of another female faculty member to handle the plaintiff’s internal grievance as “too little and too late to qualify him for immunity.”³³⁷ The court next examined whether the constitutional right at issue was clearly established at the time of the alleged violation. Prior cases, it noted, had established that “schools are required to give male and female students equivalent levels of protection.”³³⁸ Consequently, a reasonable university administrator was on notice as of 1998 that recommendation of a female professor’s termination amidst allegations of gender and ethnic discrimination, coupled with false reports of approval by an advisory committee, violated federal law.³³⁹

330. *Id.* at 844-45.

331. *Id.* at 838.

332. *Id.* The dean was also aware that the Faculty Review Committee had subsequently asked the department head to withdraw his termination recommendation.

333. *Id.* at 839-40.

334. *Id.* at 841. “Government officials performing discretionary functions are entitled to qualified immunity from suit unless their conduct violated clearly established constitutional rights of which a reasonable person would have known.” *Id.* (citation and internal quotation marks omitted).

335. *Id.* at 843.

336. *Id.*

337. *Id.*

338. *Id.* at 844.

339. *Id.* at 844-45.

A few months after the *Nanda* decision, *Lauth v. McCollum*³⁴⁰ rejected a police officer's challenge to his termination under a demanding standard of review for public employees pursuing "class of one" equal protection claims.³⁴¹ Chester Lauth, the police officer, was sanctioned by the local board of police commissioners for mishandling a missing child report. Lauth brought a "class of one" suit³⁴² against the chief and others, alleging that his discipline deprived him of equal protection in violation of the Fourteenth Amendment to the U.S. Constitution.³⁴³ He pointed to another officer who had, years earlier, committed a similar infraction without consequence, and he attributed the difference in treatment to animosity toward his role in unionizing the police force.

Reviewing summary judgment against Lauth, the court described the classic "class of one" equal protection violation as occurring when "a public official, with no conceivable basis for his action other than spite or some other improper motive (improper because unrelated to his public duties), comes down hard on a hapless private citizen."³⁴⁴ Because such plaintiffs do not belong to any "suspect" or favored class, explained the court, they must defeat "any reasonably conceivable state of facts that could provide a rational basis for the classification."³⁴⁵ Without such limits, wrote Judge Posner, class-of-one cases could "effectively provide a federal cause of action for review of almost every executive and administrative decision made by state actors."³⁴⁶ Turning to Lauth, the court found evidence of discrimination lacking. Lauth offered no evidence that another officer was similarly situated but deliberately treated differently, or that "totally illegitimate animus" solely motivated his discipline.³⁴⁷

That *Lauth* and *Nanda* reached different results owes less to their differing panels, than to their different claims. Judge Posner noted that "the case for federal judicial intervention in the name of equal protection is especially thin" when the unequal treatment in a "class of one" case arises from the employment relationship and that the court could find no "'class of one' cases in which a public employee has prevailed. . . ."³⁴⁸

340. 424 F.3d 631 (7th Cir. 2005).

341. *Id.* at 634.

342. Class of one cases are those in which a plaintiff argues only that he is being treated "arbitrarily worse than some one or ones identically situated to him," not that he is a member of a class being discriminated against by the defendant. *Id.* at 633; *see, e.g., Village of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000).

343. *Lauth*, 424 F.3d at 631-32.

344. *Id.* at 633.

345. *Id.* at 634 (citation and internal quotation marks omitted).

346. *Id.* Posner also stated that class-of-one cases run amok would "inject the federal courts into an area of labor relations that Congress disclaimed a federal interest in." *Id.* at 633.

347. *Id.* at 634.

348. *Id.* at 633.

VIII. OTHER FEDERAL LAW DEVELOPMENTS

Less easily categorized, a handful of federal cases published during the survey term nevertheless merit individual discussion. One such case is *City of San Diego v. Roe*,³⁴⁹ in which the Supreme Court examined the speech rights of a public employee. The case arose from police officer John Roe's sale of sexually explicit videos on the Internet.³⁵⁰ The videos depicted him removing a generic police uniform and masturbating.³⁵¹ Roe challenged his resulting termination, contending the videos were protected as speech on a matter of public concern. The Ninth Circuit reversed the district court's dismissal of his claim, and the Supreme Court agreed to undertake review.³⁵²

Although recognizing that public employees' off-duty speech may enjoy First Amendment protection, the Supreme Court found that Roe's conduct affected "legitimate and substantial" employer interests.³⁵³ The Court noted that Roe "took deliberate steps" to link his expression to his police duties—using a police uniform, including a law enforcement reference on his website, and listing his occupation as "in the field of law enforcement."³⁵⁴ The Court determined that this purposeful connection harmed Roe's employer.³⁵⁵ And it disagreed with Roe's contention that the videos contain speech on a matter of public concern.³⁵⁶ In a per curiam opinion, the Court reversed the Ninth Circuit's reinstatement of Roe's First Amendment claim.³⁵⁷

The Seventh Circuit recently applied *Roe* in *Schad v. Jones*.³⁵⁸ George Schad alleged that the police department transferred him to a less prestigious position in retaliation for exercising his First Amendment rights. Citing *Roe*, the Seventh Circuit noted that public employees do not relinquish the right to free speech by accepting government employment.³⁵⁹ But as in *Roe*, the court found the speech at issue—here, Schad's relaying of a dangerous suspect's location to another officer—unprotected.³⁶⁰ Schad had communicated internal (rather than public) department information, with no goal of public comment. His "judgment call"

349. 543 U.S. 77 (2004) (per curiam).

350. *Id.* at 78.

351. *Id.* at 78-79.

352. *Id.* at 79-80.

353. *Id.* at 81.

354. *Id.*

355. *Id.* "[T]he debased parody of an officer performing indecent acts while in the course of official duties brought the mission of the employer and the professionalism of its officers into serious disrepute." *Id.*

356. *Id.* at 83-84. "[P]ublic concern," it explained, "is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." *Id.*

357. *Id.* at 85.

358. 415 F.3d 671 (7th Cir. 2005).

359. *Id.* at 674.

360. *Id.* at 676.

did not, therefore, amount to constitutionally protected speech.³⁶¹

Returning to the private sector, the Seventh Circuit decided a significant question under the National Labor Relations Act (“NLRA”) in *Brandeis Machinery & Supply Co. v. National Labor Relations Board*,³⁶² holding that employee handbook language urging employees to report pro-union “harassment” violated section 8(a)(1) of the NLRA. The language at issue advised employees:

This is a non-union organization. It always has been and it is certainly our desire that it always will be that way. . . . You have a right to join and belong to a union and you have an equal right NOT to join and belong to a union. If any other employee should interfere or try to coerce you into signing a union authorization card, please report it to your Supervisor and we will see that the harassment is stopped immediately.³⁶³

The National Labor Relations Board (“Board”) found that by encouraging employees to report co-workers who solicit union support, the employer’s handbook unlawfully interfered with the right to organize collectively.³⁶⁴

Although finding substantial evidence to support the Board’s decision, the Seventh Circuit applied a different analysis. The court began with the proposition that “proponents of unions may ‘engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited.’”³⁶⁵ Moving to the Brandeis handbook, the court deemed its reporting provision at odds with the right to solicit. First, the policy appeared in a section of the handbook that explained Brandeis’s desire to remain union-free, rather than as part of a general anti-harassment policy.³⁶⁶ Second, the warnings only encouraged reports of pro-union harassment, rather than all harassment related to union organizing efforts.³⁶⁷ And third, the policy was disseminated to all employees upon hire, rather than as specific incidents or threats arose.³⁶⁸ The resulting absence of “limiting principles”—that is, the absence of guidelines to

361. *Id.* at 678. More recently, the Supreme Court has issued a broader basis for such rulings, holding that: “When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006).

362. 412 F.3d 822 (7th Cir. 2005).

363. *Id.* at 825-26.

364. *Id.* at 829; *see also* 29 U.S.C. § 158(a)(1) (2000).

365. *Brandeis*, 412 F.3d at 830 (quoting *Ryder Truck Rental, Inc.*, 341 NLRB No. 109, 2004 WL 963370, at *1 (N.L.R.B. Apr. 30, 2004), *order enforced*, *Ryder Truck Rental, Inc. v. NLRB*, 401 F.3d 815 (7th Cir. 2005)).

366. *Id.* at 831.

367. *Id.* There was no “equal protection” guarantee, as found in prior cases, indicating that the company would seek to stave off harassment regardless of the alleged harasser’s union leanings. *Id.*

368. *Id.*

help employees determine whether perceived harassment actually violated the NLRA—increased the chances that pro-union employees would be disciplined for legally unobjectionable conduct.³⁶⁹ Affirming the judgment of the Board, the court wrote: “It is incumbent upon employers to use language that ‘is not reasonably subject to an interpretation that would unlawfully affect the exercise’” of their rights under the NLRA.³⁷⁰

A different sort of statutory protection came under scrutiny in *Roquet v. Arthur Andersen LLP*.³⁷¹ There, the Seventh Circuit examined the “unforeseen business circumstances” exception to the federal Worker Adjustment and Restraining Notification (“WARN”) Act’s requirement that employers provide sixty days’ notice of impending layoffs to employees.³⁷² In March 2002, news of Andersen’s criminal indictment triggered a “massive client defection,”³⁷³ leading the company to notify employees on April 8, 2002, of layoffs that were to begin a little more than two weeks later. Andersen admittedly knew the Department of Justice was investigating its document shredding and other matters as early as November 2001.³⁷⁴ Nevertheless, the court found Anderson’s March indictment unforeseeable.³⁷⁵ Noting that the Supreme Court had only recently agreed to consider the “rather unprecedented step [of] indicting (and convicting) the company as an entity,”³⁷⁶ the court determined that “a reasonable company in Andersen’s position would have reacted as it did. Confronted with the possibility of an indictment that threatened its very survival, the firm continued to negotiate with the government until the very end and turned to layoffs only after the indictment became public.”³⁷⁷ The employees’ WARN claim against Andersen failed, and summary judgment against the plaintiffs was affirmed.³⁷⁸

IX. OTHER STATE LAW DEVELOPMENTS

Several state court decisions hold particular interest for employers. Notably, in *Montgomery v. Board of Trustees of Purdue University*,³⁷⁹ the Indiana Court of Appeals affirmed the dismissal of a former Purdue employee’s claim under

369. *Id.*

370. *Id.*

371. 398 F.3d 585 (7th Cir.), *reh’g and reh’g en banc denied* (7th Cir.), *cert. denied*, 126 S. Ct. 375 (2005).

372. *Id.* at 586.

373. *Id.* at 587.

374. *Id.*

375. *Id.* at 589.

376. *Id.* at 589 n.1.

377. *Id.* at 589.

378. *Id.* at 591; *see Roquet v. Arthur Andersen LLP*, 126 S. Ct. 375 (2005) (denying certiorari).

379. 824 N.E.2d 1278 (Ind. Ct. App.), *trans. granted and opinion vacated*, 841 N.E.2d 181 (Ind. 2005).

Indiana's Age Discrimination Act ("IADA"). The IADA applies to all employers *except* "a person or governmental entity which is subject to the federal Age Discrimination in Employment Act" ("ADEA").³⁸⁰ Applying this exception, the court found that while Purdue is immune from ADEA liability for *monetary* damages,³⁸¹ the university could be subjected to injunctive sanctions.³⁸² It concluded that Purdue thus fell outside the scope of the IADA,³⁸³ and affirmed the trial court's dismissal of Michael Montgomery's claim.³⁸⁴ On August 11, 2005, however, the Indiana Supreme Court accepted transfer and vacated the decision of the appellate court. The status of IADA claims against state universities remains uncertain.

The plaintiff in *Keene v. Marion County Superior Court*³⁸⁵—a significant wrongful termination case—initially fared no better than Montgomery. Robert Keene was notified by his employer on August 25, 1998, that it would discharge him one month later.³⁸⁶ Ultimately terminated on September 25, 1998, Keene did not file his wrongful termination claim based on alleged age discrimination until September 25, 2000.³⁸⁷ In a matter of first impression, the court of appeals held that the limitations period had already expired. The two-year statute of limitations governing actions against the state "relating to the terms, conditions, and privileges of employment"³⁸⁸ began to run, according to the court, "at the time the decision to discharge Keene was communicated to him in the notice of August 25, 1998."³⁸⁹ Subsequently, however, Keene petitioned for transfer, arguing that the limitations period should not run until he discovered the age of his replacement and thus the basis for his claim. The Indiana Supreme Court granted transfer on July 13, 2005, vacating the opinion of the appellate court.³⁹⁰ The question of when an action for age discrimination accrues for purposes of Indiana Code section 34-11-2-2 thus remains to be decided.

Employee plaintiffs fared only slightly better in the private arena, arguably winning their most significant victory in *Burgess v. E.L.C. Electric, Inc.*³⁹¹ Matthew Burgess and other employees sued their public contractor employer

380. IND. CODE §§ 22-9-2-1 to -2 (2005).

381. *Montgomery*, 824 N.E.2d at 1281.

382. *Id.* at 1281-82 (citing *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000)). In *Kimel*, the Supreme Court held that the ADEA did not properly abrogate States' Eleventh Amendment immunity, and therefore that state employee plaintiffs alleging discrimination based on age were limited to suits for injunctive relief. *Kimel*, 528 U.S. at 91.

383. *Montgomery*, 824 N.E.2d at 1281.

384. *Id.* at 1282-83.

385. 823 N.E.2d 1216 (Ind. Ct. App.), *trans. granted and opinion vacated* (Ind. 2005).

386. *Id.* at 1217.

387. *Id.*

388. IND. CODE § 34-11-2-2 (2005).

389. *Keene*, 823 N.E.2d at 1218.

390. *Id.* at 1216.

391. 825 N.E.2d 1 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 180 (Ind. 2005).

under Indiana's Common Construction Wage Act ("the Act"),³⁹² seeking unpaid wages, liquidated damages, and attorneys fees.³⁹³ The trial court granted summary judgment in favor of the contractor and found that the Employee Retirement Income Security Act ("ERISA") preempted the Act.³⁹⁴ The appellate court held, as a matter of first impression, that the Act has no connection with ERISA for purposes of federal preemption.³⁹⁵ Accordingly, it reversed, allowing the employees to proceed with their claims.³⁹⁶

CONCLUSION: ON THE HORIZON

Two cases beyond the survey period warrant particular attention. In *IBP, Inc. v. Alvarez*,³⁹⁷ the Supreme Court consolidated appeals by Maine poultry workers and employees of a meat processing plant to decide when the workday begins under the Fair Labor Standards Act. In its unanimous November 2005 decision, the Court distinguished time that employees spend walking (dressed) between changing and production areas and the time spent waiting to put on the first piece of gear.³⁹⁸ The first is compensable time under the FSLA, according to the Court, while the second is not.³⁹⁹

To reach this conclusion, Justice Stevens recounted how Congress had rejected the Court's broad interpretation of the workday by passing the Portal-to-Portal Act, which amended the FSLA to exclude time spent "walking on the employer's premises to and from the actual place of performance of the principal activity of the employee, and activities that are 'preliminary or postliminary' to that principal activity."⁴⁰⁰ The Court also relied on its ruling in *Steiner v. Mitchell*,⁴⁰¹ that time spent donning protective clothes was compensable.⁴⁰² Finally, it adopted a continuous workday theory, concluding that once started, work does not stop as the employee moves from the changing area to the production line.⁴⁰³ By comparison, the Court held that the FSLA excludes the time employees spend waiting in line for safety equipment and protective gear

392. IND. CODE §§ 5-16-7-1 to -5 (2005).

393. *Burgess*, 825 N.E.2d at 7. The Employees sought "damages equal to the amount of unpaid wages representing the difference between the amount each Plaintiff was paid by ELC and the amount each Plaintiff should have received from ELC had he or she been paid the prevailing wage scale rate as required by statute." *Id.* (quoting Appellant's App. at 14).

394. *Id.* at 4-5.

395. *Id.* at 12.

396. *Id.* at 16.

397. 126 S. Ct. 514 (2005). This case was consolidated with *IBP, Inc. v. Alvarez* for review by the U.S. Supreme Court.

398. *Id.* at 518.

399. *Id.* at 521.

400. *Id.* at 520.

401. 350 U.S. 247, 248 (1956).

402. *IBP, Inc.*, 126 S. Ct. at 521.

403. *Id.* at 522, 525.

when they arrive at work.⁴⁰⁴ Waiting, according to the Court, was two steps removed from the beginning of productive activity, thus falling within the Portal-to-Portal Act's exception for "activities which are preliminary to or postliminary to a principal activity or activities."⁴⁰⁵

An important case likely to be decided in the coming survey period is *Arbaugh v. Y & H Corp.*⁴⁰⁶ On May 16, 2005, the Supreme Court granted certiorari in *Arbaugh*, which addressed whether the fifteen-employee threshold of Title VII⁴⁰⁷ is an unwaivable jurisdictional requirement—a subject of conflicting opinions in circuit courts.⁴⁰⁸ In *Sharpe v. Jefferson Distributing Co.*,⁴⁰⁹ for example, the Seventh Circuit asserted that, "[a] plaintiff's inability to demonstrate that the defendant has 15 [or more] employees is just like any other failure to meet a statutory requirement," and concluded that "[s]urely [this] is not the sort of question a court . . . must raise on its own, which a 'jurisdictional' characterization would entail."⁴¹⁰ But bound by precedent, the Fifth Circuit in *Arbaugh* remained with the Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits in treating the "employer" definition as creating a jurisdictional requirement.⁴¹¹

404. *Id.* at 527.

405. *Id.* at 528 (quoting 29 U.S.C. § 254(a)(2) (2000)).

406. 380 F.3d 219 (5th Cir. 2004), *cert. granted*, 544 U.S. 1031 (2005).

407. 42 U.S.C. § 2000e(b) (2000).

408. *Arbaugh*, 380 F.2d at 223.

409. 148 F.3d 676, 677 (7th Cir. 1998), *abrogated on other grounds*, *Papa v. Kay Indus.*, 166 F.3d 937, 939-40 (7th Cir. 1999).

410. *Id.* at 677-78.

411. *Arbaugh*, 380 F.3d at 224.

RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW

JEFF PAPA*

The Indiana Rules of Evidence (“Rules”) became effective in 1994. Although more than a decade has passed since the introduction of the Rules, their interpretation remains a daily exercise as new fact patterns arise and prior decisions are reevaluated. The process of integrating the Rules with statutory law and the remaining elements of common law, as well as their interaction with federal authority will continue for many years.

This Article explains many of the developments in Indiana Evidence law during the period between October 1, 2004, and September 30, 2005. The discussion topics of this Article are grouped in the same subject order as the Indiana Rules of Evidence.

I. SCOPE OF THE RULES

A. *In General*

According to Rule 101(a), the Rules apply to all Indiana court proceedings “except as otherwise required by the Constitution of the United States or Indiana, by the provisions of this rule, or by other rules promulgated by the Indiana Supreme Court.”¹ In situations where the rules do not “cover a specific evidence issue, common or statutory law shall apply.”² This provision leaves the applicability of the Rules open to debate.

The wording of Rule 101(a), requiring the application of statutory or common law in areas not covered by the Rules, has been interpreted by the Indiana Supreme Court to mean that the Rules trump any conflicting statute.³

B. *Rulings on Evidence*

In *Guillen v. State*,⁴ Guillen argued that the trial court abused its discretion by excluding specific instances of the victim’s reckless behavior while intoxicated to demonstrate a character trait.⁵ At trial for battery on the victim, Guillen had been prevented from introducing evidence regarding the victim’s prior bad acts, alcoholism, and alcohol usage.⁶ Rule 103(a) provides that “error may not be predicated upon a ruling which admits or excludes evidence unless

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1. IND. R. EVID. 101(a).

2. *Id.*

3. *See Williams v. State*, 681 N.E.2d 195, 200 n.6 (Ind. 1997); *Humbert v. Smith*, 664 N.E.2d 356, 357 (Ind. 1996).

4. 829 N.E.2d 142 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 182 (Ind. 2005).

5. *Id.* at 145.

6. *Id.*

a substantial right of the party is affected.”⁷ Guillen’s argument on appeal failed because the court determined that his substantial rights were not affected.⁸ Guillen was able to provide a vigorous defense through his own testimony and via cross-examination of the victim.⁹

In *Ross v. Olson*,¹⁰ an expert witness had testified as to his understanding of the meaning of the term “Iatrogenic Injury,” as it had appeared in the medical report he prepared, and he read the dictionary definition of this term into evidence.¹¹ During direct examination of their own expert witness, the Rosses asked the witness whether he recognized the term and if he agreed with the dictionary definition. The court sustained an objection to this line of questioning.¹²

In addition to the portion of Rule 103(a) quoted above, Rule 103(a)(2) states that where “the ruling is one excluding evidence, the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked.”¹³ Although the Rosses made no offer of proof, they claimed on appeal that the substance of the excluded evidence was apparent to the trial court. The court determined that the jury had already heard the dictionary definition of the term, and because the testimony regarded the term as used by the writer of the medical report, it was the writer’s understanding of the term which was relevant, rather than an interpretation of the term by a second witness.¹⁴ Therefore, the court found that the Rosses had demonstrated no abuse of discretion by the trial court.¹⁵

In *Illiana Surgery & Medical Center, LLC v. STG Funding, Inc.*,¹⁶ Illiana appealed the trial court’s decision to exclude evidence of a missing October 2000 loan commitment letter.¹⁷ The trial court had enforced an April 2001 loan commitment letter and prohibited Illiana from questioning STG on cross-examination regarding the earlier, missing document.¹⁸ This exclusion was based on the finding that the 2001 document was sufficiently complete to enforce the agreement and the parole evidence rule prevented introduction of evidence regarding the earlier, missing document.¹⁹

Illiana argued that the evidence should have been admitted pursuant to Rule

7. IND. R. EVID. 103(a).

8. *Guillen*, 829 N.E.2d at 147.

9. *Id.*

10. 825 N.E.2d 890 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 181 (Ind. 2005).

11. *Id.* at 894.

12. *Id.* at 895.

13. IND. R. EVID. 103(a)(2).

14. *Ross*, 825 N.E.2d at 895.

15. *Id.*

16. 824 N.E.2d 388 (Ind. Ct. App. 2005).

17. *Id.* at 392.

18. *Id.* at 399-400.

19. *Id.* The 2001 document did state that it was “an extension and modification of the original commitment letter dated and executed October 24, 2000 (Exhibit A).” *Id.* at 400.

1004, which provides that

[t]he original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if: (1) Originals Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; (2) Original Not Obtainable. No original can be obtained by any available judicial process or procedure²⁰

The court noted that the 2001 agreement contained an integration clause and upheld the trial court's ruling pursuant to the parole evidence rule.²¹ The court further noted that, even assuming the trial court abused its discretion by excluding the evidence, any error was harmless under Rule 103(a) because evidence of the previous agreement had been introduced at other times during the trial and Illiana had not demonstrated that its substantial rights had been prejudiced.²²

C. Preliminary Questions

In *Willis v. Westerfield*,²³ the court of appeals reversed and remanded its previous decision. It found on rehearing that the trial court erred by instructing the jury on the affirmative defense of failure to mitigate damages because there was no expert testimony supporting the contention that the plaintiff took action or failed to take action resulting in aggravation of injuries.²⁴ This decision rested, in part, on Rule 104(b), which provides that "when the relevancy of evidence depends upon the fulfillment of a condition of fact, the Court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."²⁵

On transfer, the Indiana Supreme Court held that failure to mitigate damages may not always require expert testimony. This should be determined on a case by case basis. Where the failure to mitigate involves technical or medical issues, expert testimony may be required; where the issues are simple and may be interpreted by lay jurors, such as failure to take recommended medical treatment, expert testimony may not be required.²⁶ The supreme court vacated the judgment as to damages and remanded for a new trial on damages because the defendant's theory of failure to mitigate should have been (and was not) supported by expert testimony.²⁷

20. IND. R. EVID. 1004.

21. *Illiana*, 824 N.E.2d at 400.

22. *Id.* at 401.

23. 817 N.E.2d 672 (Ind. Ct. App. 2004), *vacated*, 839 N.E.2d 1179 (Ind. 2006).

24. *Id.* at 673.

25. IND. R. EVID. 104(b).

26. *Willis*, 839 N.E.2d at 1188-89.

27. *Id.* at 1190.

D. Limited Admissibility

In *Glasscock v. Corliss*,²⁸ Glasscock argued that the jury had based its decision on improper evidence in considering the amount of commissions owed to Corliss when she was terminated from the company and the total net worth of Glasscock.²⁹ However, the \$49,000 commission foregone and the net worth information had been admitted pursuant to Rule 105 limiting instructions.³⁰

The court found that the commission evidence was relevant to show motive for sullyng Corliss's reputation, and the net worth information was relevant to the jury's assessment of punitive damages.³¹ Because Rule 401 provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence,"³² it was not error for the trial court to admit this evidence with the relevant limiting instruction.³³

E. Request for Introduction of Remainder of Writing

In *Sanders v. State*,³⁴ Sanders appealed his conviction arguing that a letter he wrote to the judge should have been admitted in its entirety.³⁵ The letter apologized to the court and the victim's family, but never admitted that Sanders committed the crime. The letter also claimed that the victim's father and her mother's boyfriend had molested the girl, but this claim was redacted from the version admitted into evidence.³⁶

Sanders argued on appeal that under Rule 106, the letter should have been admitted in its entirety. Rule 106 provides that when "a writing . . . or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing . . . which in fairness ought to be considered contemporaneously with it."³⁷ The court noted that admission of the redacted portion of the letter would have violated Rule 412,³⁸ but determined that admission of the letter without the redacted portion was more prejudicial

28. 823 N.E.2d 748 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 183 (Ind. 2005).

29. *Id.* at 758.

30. *Id.* Rule 105 states that "[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly." IND. R. EVID. 105.

31. *Glasscock*, 823 N.E.2d at 758.

32. IND. R. EVID. 401.

33. *Glasscock*, 823 N.E.2d at 758.

34. 823 N.E.2d 313 (Ind. Ct. App. 2005).

35. *Id.* at 317.

36. *Id.*

37. IND. R. EVID. 106.

38. Rule 412 provides that, "[i]n a prosecution for a sex crime, evidence of the past sexual conduct of a victim or witness may not be admitted." IND. R. EVID. 412.

than probative under Rule 403 and ordered a new trial.³⁹

II. RELEVANCE AND PROBATIVE VERSUS PREJUDICIAL

A. Relevant Evidence

In *Brown v. State*,⁴⁰ the defendant appealed his conviction for fleeing police officers. Brown sought at trial to introduce evidence of police officer brutality during his arrest as evidence relevant to his claim that he was justified in fleeing because the officers had a violent history with Brown.⁴¹ The trial court had refused to allow this evidence, and the Indiana Court of Appeals agreed.⁴² The court found the evidence remote and not relevant to the charges, and ruled that the evidence had been properly excluded under Rule 401⁴³ as irrelevant because it showed examples of officer conduct or Brown's conduct after Brown had completed the charged crime.⁴⁴

In *Davidson v. Bailey*,⁴⁵ Davidson argued that the trial court had erred in admitting evidence of his prior DUI convictions and in excluding evidence of the plaintiff's prior DUI convictions. Davidson argued that this evidence was highly prejudicial as there was a danger that the jury would punish him for his prior acts.⁴⁶ The court held that evidence regarding Davidson's prior DUI convictions was properly admitted because it was relevant to Davidson's state of mind at the time of the accident as to whether his behavior was willful and wanton.⁴⁷ This result was distinguished from the result in *Wohlwend v. Edwards*,⁴⁸ which had determined that it was not permissible to admit evidence of drunken driving committed subsequent to the act in question, even if limited to the subject of

39. *Glasscock*, 823 N.E.2d at 318. Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." IND. R. EVID. 403.

40. 830 N.E.2d 956 (Ind. Ct. App. 2005).

41. *Id.* at 964-65.

42. *Id.* at 966.

43. Rule 401 provides that relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." IND. R. EVID. 401. Rule 402 follows this thought by stating that "[e]vidence which is not relevant is not admissible." IND. R. EVID. 402. The court of appeals did, however, vacate two of the charges related to fleeing as the State had charged three portions of one continuing act of fleeing as separate crimes. *Brown*, 830 N.E.2d at 966.

44. *Brown*, 830 N.E.2d at 966. In other words, actions the officers or Brown took at Brown's arrest could not have served as the basis for his actions in fleeing the officers prior to the arrest. *See id.*

45. 826 N.E.2d 80 (Ind. Ct. App. 2005).

46. *Id.* at 86.

47. *Id.* (quoting *Wohlwend v. Edwards*, 796 N.E.2d 781, 784 (Ind. Ct. App. 2003)).

48. *Id.* at 85-86.

punitive damages.⁴⁹

The court also found that evidence of the plaintiff's prior DUI convictions had been properly excluded.⁵⁰ The evidence was not relevant to any issue in dispute, and because DUI convictions are not crimes of dishonesty, the evidence was not admissible under the Rule 609 exception.⁵¹

In *Sandifur v. State*,⁵² Sandifur appealed his conviction for a drug offense, arguing that evidence that a person (who had last been seen alive by Sandifur) had died of a drug overdose was irrelevant and unfairly prejudicial.⁵³ The State argued that the evidence was relevant to its contention that Sandifur had delivered drugs to the deceased person, and that the evidence was necessary under the *corpus delicti* rule. Under the *corpus delicti* rule in Indiana, a person may not be convicted of a crime based solely on a confession.⁵⁴

The court ruled that the evidence was relevant under Rule 401, as it provided evidence of the crime other than the confession and related to the charge against Sandifur. In considering Rule 403(b)'s balancing test, the court determined that although the evidence was prejudicial, the prejudice was outweighed by the evidence's probative value.⁵⁵ The autopsy report contained no photos, was written in a professional manner, and showed that the deceased had received drugs.⁵⁶

B. Prohibition on Character and Other Evidence to Prove Conduct

In *Wilhelmus v. State*,⁵⁷ Wilhelmus appealed his conviction, in part, on the basis that highly prejudicial evidence with little probative value had been allowed in by the trial court without a limiting instruction.⁵⁸ The State was allowed to introduce evidence of Wilhelmus's prior arrest for involvement with a methamphetamine lab in order to prove identity. Wilhelmus argued that there had been no question of identity in the current case, and had objected at trial that the evidence served no legitimate purpose. The trial court twice denied his

49. *Id.*

50. *Id.* at 87.

51. *Id.* Rule 609(a) provides that

[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime shall be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, criminal confinement or perjury; or (2) a crime involving dishonesty or false statement.

IND. R. EVID. 609(a).

52. 815 N.E.2d 1042 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 984 (Ind. 2004).

53. *Id.* at 1044, 1047.

54. *Id.* at 1047; *see* *Lawson v. State*, 803 N.E.2d 237, 240 (Ind. Ct. App. 2004).

55. *Sandifur*, 815 N.E.2d at 1048.

56. *Id.*

57. 824 N.E.2d 405 (Ind. Ct. App. 2005).

58. *Id.* at 410, 414.

request for a limiting instruction.⁵⁹

The court declined to accept Wilhelmus's argument on appeal, noting that the identity exception to Rule 404(b)⁶⁰ is crafted primarily for signature crimes, and the meth labs in the previous arrest and current case were quite similar.⁶¹ It also noted that a final instruction was given to the jury, limiting consideration of the prior arrest evidence to the question of identity.⁶²

In *Purvis v. State*,⁶³ Purvis objected to admission of evidence at trial from two police officers that he had previously used an alias and represented himself as being fifteen years old.⁶⁴ The court found this evidence was properly admitted to show identity under Rule 404(b) because it was the same alias and false age Purvis had used in dealing with the current victim.⁶⁵ The evidence allowed at trial also did not identify the prior crimes or bad acts involved in the prior incidents.⁶⁶

In *Vandivier v. State*,⁶⁷ the defendant appealed his conviction for obstruction of justice. Vandivier had convinced a friend to provide police with a false statement, stating that his wife had falsely accused him of breaking into her house.⁶⁸ Vandivier had been convicted at trial for obstruction because this statement to the police was to be used to bolster his position in a child custody proceeding. On appeal, Vandivier argued that his friend's actions had no relevance to his own actions.⁶⁹

The court determined that the false statement had been initiated by Vandivier, and the statement could have misled a public servant in the custody hearing.⁷⁰ Therefore, the statement was indeed relevant to the obstruction charge and had been properly admitted pursuant to Rule 401.⁷¹

In *Goldsberry v. State*,⁷² Goldsberry appealed his convictions for criminal recklessness and battery. He argued that the trial court had improperly admitted

59. *Id.* at 413-14.

60. Rule 404(b) states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as . . . identity." IND. R. EVID. 404(b).

61. *Wilhelmus*, 824 N.E.2d at 415.

62. *Id.* However, the court found the denial of Wilhelmus's requests for limiting instructions troubling. It noted that Rule 105 is mandatory and a trial court must admonish the jury prior to the introduction of such evidence. *Id.*

63. 829 N.E.2d 572 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 180 (Ind. 2005), *cert. denied*, 126 S. Ct. 1580 (2006).

64. *Id.* at 586.

65. *Id.* at 586-87.

66. *Id.* at 587.

67. 822 N.E.2d 1047 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 745 (Ind. 2005).

68. *Id.* at 1050.

69. *Id.* at 1052-53.

70. *Id.* at 1053.

71. *Id.*

72. 821 N.E.2d 447 (Ind. Ct. App. 2005).

evidence of prior altercations between himself and the victim.⁷³ The court found this evidence admissible under Rule 404(b) because Goldsberry had claimed that he acted in self-defense and that discharge of the firearm was an accident.⁷⁴

The court distinguished this case from *Wickizer v. State*,⁷⁵ in which the Indiana Supreme Court had ruled such evidence inadmissible where the opponent had not presented a particularly contrary intent prior to the State introducing the prior bad act evidence.⁷⁶ The court also noted that in *Iqbal v. State*⁷⁷ such evidence was admitted in order to show the relationship between the parties and the lack of accident or mistake.⁷⁸ Goldsberry attempted to distinguish his case in that Iqbal had used a gun in the prior and charged incidents, while Goldsberry had not previously used a firearm.⁷⁹ The court determined that, because the evidence was used for a purpose other than to demonstrate Goldsberry's propensity to commit the crime, it was admissible under Rule 404(b).⁸⁰

Goldsberry also appealed based on the introduction of threatening phone messages left on the victim's voice mail three months after the crime occurred.⁸¹ Because nothing in those messages was helpful to the jury in determining whether Goldsberry committed the crime, the court agreed that this evidence was improperly admitted under Rule 401.⁸² However, the error was found harmless due to the amount of other evidence properly admitted and Goldsberry's inability to show sufficient prejudice from the error to overturn his convictions.⁸³

C. Methods of Proving Character

In *Guillen*,⁸⁴ discussed *supra*, Guillen argued that evidence of specific instances of the victim's reckless behavior when intoxicated should have been admitted under Rule 405(b).⁸⁵ Rule 405(b) provides that "[i]n cases in which character or trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct."⁸⁶ The court found no authority suggesting that the victim's character was an essential element of Guillen's defense that he did not hit her, and

73. *Id.* at 453.

74. *Id.* at 455-56.

75. 626 N.E.2d 795, 799 (Ind. 1993).

76. *Goldsberry*, 821 N.E.2d at 455-56.

77. 805 N.E.2d 401, 408 (Ind. Ct. App. 2004).

78. *Goldsberry*, 821 N.E.2d at 456.

79. *Id.*

80. *Id.*

81. *Id.* at 457.

82. *Id.* at 457-58.

83. *Id.* at 458.

84. *Guillen v. State*, 829 N.E.2d 142 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 182 (Ind. 2005).

85. *Id.* at 145-47.

86. IND. R. EVID. 405(b).

therefore the court rejected Guillen's argument under Rule 405(b).⁸⁷

In *Bell v. State*,⁸⁸ Bell appealed his convictions for child molesting. Bell argued that he should have been allowed to present evidence of the victim's assertiveness in other instances.⁸⁹ He argued this would show that the molestations did not occur because, if they had, she would have told someone sooner or behaved aggressively towards Bell.⁹⁰

Although Rule 404(a)(2) does allow for evidence of a person's character trait where it is evidence of "a pertinent trait of character of the victim of the crime offered by an accused,"⁹¹ Rule 405 requires such evidence to be offered only by reputation or opinion testimony.⁹² The court determined that Bell's testimony would not have been reputation or opinion testimony, but rather would have been direct testimony of specific instances of the victim's conduct to illustrate her behavior in this case. Bell's appeal failed as this type of evidence is specifically what Rules 404 and 405 were designed to exclude.⁹³

In *Pinkston v. State*,⁹⁴ Pinkston argued that evidence of a prior bad act had been admitted erroneously at trial. The trial court had admitted Pinkston's statement, made while awaiting trial, that he had "killed a motherf****r before and got away with it and I'll get off on this one too."⁹⁵ The court cited *Evans v. State*⁹⁶ for its proposition that, in such cases, the trial court should: "(1) determine whether the evidence of other [bad] acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) balance the probative value of the evidence against its prejudicial effect [under Rule 403]."⁹⁷ The court further noted that evidence of prior bad acts is relevant to negate a claim of contrary intent where the defendant goes beyond a mere denial and makes a claim of particular contrary intent.⁹⁸

Pinkston's statement that he would "get off on this one too" was relevant to

87. *Guillen*, 829 N.E.2d at 147. The court noted that Rule 405(b) applies when "a person's character is a material fact that determines the parties' rights and liabilities under the substantive law." *Id.* at 146 (quoting *In re J.L.V.*, 667 N.E.2d 186, 190 (Ind. Ct. App. 1996)).

88. 820 N.E.2d 1279 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 744 (Ind. 2005).

89. *Id.* at 1282.

90. *Id.*

91. IND. R. EVID. 404(a)(2).

92. Rule 405 provides that "[i]n all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion." IND. R. EVID. 405. Evidence of specific instances of conduct may only be offered on cross-examination or where character is an essential element of a charge, claim, defense, or proof. *Id.*

93. *Bell*, 820 N.E.2d at 1282-83.

94. 821 N.E.2d 830 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 738 (Ind. 2005).

95. *Id.* at 837 (quoting Appellant's App. p. 215-17).

96. 727 N.E.2d 1072, 1079 (Ind. 2000).

97. *Pinkston*, 821 N.E.2d at 837-38; IND. R. EVID. 403.

98. *Pinkston*, 821 N.E.2d at 838. (citing *Iqbal v. State*, 805 N.E.2d 401, 406 (Ind. Ct. App. 2004)).

show his intent to murder the victim and to rebut his claim that he had not been the aggressor.⁹⁹ Because the statement was highly probative of Pinkston's intent, the court ruled that the statement had been properly admitted.¹⁰⁰

D. Ineffective Assistance of Counsel Claim for Failure to Object

In *Polk v. State*,¹⁰¹ Polk appealed his conviction for possession of cocaine in part based on ineffective assistance of counsel because his attorney had failed to object on 404(b) grounds to the introduction of evidence that Polk had failed a drug test after his arrest.¹⁰² Although this may have been evidence of an uncharged bad act, the court noted that in order to succeed on a claim of ineffective assistance of counsel for failure to object, the proponent must show that he would have prevailed had a proper objection been made, and, therefore, the lack of an objection was prejudicial.¹⁰³

The court found that there was insufficient prejudice to sustain this argument, given the weight of other evidence introduced against Polk.¹⁰⁴ Polk also failed to show that this evidence was irrelevant.¹⁰⁵ Although it may have been an uncharged bad act, it occurred during the same incident and could have been relevant to prove that Polk knew the substance he was concealing was cocaine.¹⁰⁶ Because Polk could not demonstrate on appeal that an objection would have been sustained, and because counsel appeared adequate in other respects, Polk's ineffective assistance of counsel claim was rejected.¹⁰⁷

E. Probative and Prejudicial Weight of 911 Recording

In *Highler v. State*,¹⁰⁸ Highler argued that a recording of the 911 call made by the rape victim should not have been admitted into evidence at trial. Highler contended that any probative value of the tape was outweighed by its prejudicial effect, and therefore it should have been excluded under Rule 403.¹⁰⁹

99. *Id.*

100. *Id.* See also *Welch v. State*, 828 N.E.2d 433 (Ind. Ct. App. 2005), for the proposition that the state-of-mind exception to Rule 404 may not be used in a claim of self-defense to introduce evidence regarding the victim's state of mind if the accused was unaware of such information at the time of the incident. *Id.* at 437-38.

101. 822 N.E.2d 239 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 743 (Ind. 2005).

102. *Id.* at 245.

103. *Id.*

104. *Id.* at 250-51.

105. *Id.* at 251.

106. *Id.*

107. *Id.*

108. 834 N.E.2d 182 (Ind. Ct. App.), *trans. granted*, 841 N.E.2d 191 (Ind. 2005).

109. *Id.* at 198. Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." IND. R. EVID. 403.

On the 911 recording, the victim says that she was raped by Marshall (Highler's first name), and the victim and another person discuss some of the events.¹¹⁰ The only question asked by the operator was where the victim lived. In this case, the trial court had admonished the jury on use of the evidence. Although the tape was prejudicial to Highler, the recording was highly probative as Highler had claimed that the encounter was consensual and the victim had only later accused him of rape.¹¹¹ Because the probative value was not outweighed by the prejudicial effect, and the trial court had admonished the jury, the court found that the evidence had been properly admitted.¹¹² Transfer has been granted by the Indiana Supreme Court in this case, but no further action has been taken.¹¹³

F. Admission of Prior Bad Acts by Opening the Door

In *Crafton v. State*,¹¹⁴ Crafton appealed his convictions for intimidation, battery, and pointing a firearm.¹¹⁵ After testimony at trial, the trial judge had asked the jury if it had any questions about Crafton's testimony. The jury submitted written questions asking if there had been any prior instances of domestic abuse. Crafton failed to object to the question, and related one instance in which he had been the victim.¹¹⁶

Rule 404(b) prohibits evidence of other bad acts "to show action in conformity therewith,"¹¹⁷ and Rule 403 further requires a balancing of probative value versus prejudicial effect.¹¹⁸ However, where the defendant opens the door to such testimony, it becomes admissible if the evidence used to open the door leaves the trier of fact with a false or misleading impression of the facts related.¹¹⁹ Because Crafton only offered the single alleged instance in which he was the victim, he had opened the door to testimony offered by the State of two instances in which he had been the aggressor.¹²⁰ The State was entitled to correct the misconception that there had been no other instances of domestic abuse.¹²¹

In *Johnson v. State*,¹²² Johnson claimed that evidence of a prior fight that had been admitted at trial was improper evidence of a prior bad act.¹²³ While Rule

110. *Highler*, 834 N.E.2d at 198.

111. *Id.*

112. *Id.* at 199.

113. *Id.*

114. 821 N.E.2d 907 (Ind. Ct. App. 2005).

115. *Id.* at 909-10.

116. *Id.* at 911.

117. IND. R. EVID. 404(b).

118. IND. R. EVID. 403.

119. *Crafton*, 821 N.E.2d at 910-11 (citing *Jackson v. State*, 728 N.E.2d 147, 152 (Ind. 2000)).

120. *Id.* at 911.

121. *Id.* at 911-12.

122. 831 N.E.2d 163 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 183 (Ind. 2005).

123. *Id.* at 169.

404(b) would normally exclude such evidence,¹²⁴ Johnson's counsel had opened the door by asking a prosecution witness on cross-examination if he and Johnson had engaged in a confrontation the last time they were together.¹²⁵ Before Johnson's counsel could stop him, the witness testified that Johnson had sucker-punched him. On re-direct, the State was allowed to elicit testimony regarding the prior, unrelated confrontation. The court ruled this admission appropriate, as Johnson had opened the door to such testimony.¹²⁶

G. Admission of Extra-Jurisdictional Acts

In *Ware v. State*,¹²⁷ Ware argued that evidence of sexual acts between himself and the victim which took place outside the county before the victim turned sixteen is not relevant to any issue other than Ware's propensity to commit this crime.¹²⁸ The State argued that this evidence was relevant to show that Ware had knowledge of the victim's age. The court found that the probative value of this evidence was outweighed by the prejudicial effect.¹²⁹ However, a proper limiting instruction had been given to the jury, and other evidence was cumulative.¹³⁰ Therefore, the court found insufficient proof that this improperly-admitted evidence had contributed to Ware's verdict and upheld the conviction.¹³¹

H. Rule 412 and Prior Acts of the Victim

In *Morrison v. State*,¹³² Morrison appealed his conviction for molestation. On cross-examination outside the presence of the jury a witness had responded to a jury question about the victim's past sexual history with information (outside the presence of the jury) that another man had once touched the victim inappropriately in a restroom.¹³³ At trial, Morrison had been prohibited from introducing this evidence pursuant to Rule 412.¹³⁴

On appeal, Morrison argued that Rule 412 must give way to the right to cross-examine witnesses in this case in order to rebut the prosecution's implication that the victim was ignorant of sexual matters, especially the possibility of sex between two men.¹³⁵ The court noted that although *Steward v.*

124. IND. R. EVID. 404(b) (excluding evidence of other crimes, wrongs, or acts).

125. *Johnson*, 831 N.E.2d at 169 n.4.

126. *Id.* (citing *Kubsch v. State*, 784 N.E.2d 905, 919 n.6 (Ind. 2003)).

127. 816 N.E.2d 1167 (Ind. Ct. App. 2004).

128. *Id.* at 1175.

129. *Id.* at 1175-76.

130. *Id.* at 1176.

131. *Id.*

132. 824 N.E.2d 734 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 749 (Ind. 2005).

133. *Id.* at 738-39.

134. *Id.* Rule 412 invokes a general bar on the admission of evidence of past sexual misconduct. IND. R. EVID. 412.

135. *Morrison*, 824 N.E.2d at 740.

*State*¹³⁶ held that Rule 412 may not violate a defendant's right to cross-examination, the present case was distinguishable from cases allowing such testimony. Morrison had relied on *Davis v. State*¹³⁷ for its holding that the trial court in that case had improperly prevented cross-examination.¹³⁸ However, unlike in *Davis*, this evidence did not imply that someone else had committed the crime, or bring other facts into question.¹³⁹ The witnesses present at the scene had testified that they saw the crime committed, and that the victim seemed confused. There was also no implication that the victim was confusing the two incidents. The trial court had also allowed Morrison to craft questions which did not violate Rule 412, and therefore his right to cross-examination had not been unduly impeded.¹⁴⁰

III. WITNESSES

A. Leading Questions During Direct Examination

In *Riehle v. State*,¹⁴¹ Riehle argued that the State had improperly been allowed to ask leading questions on direct testimony of the victim.¹⁴² The victim was ten years old at the time of trial, reluctant to testify, and had to be called to the stand on two different days to elicit testimony. Riehle only noted one instance in which the State's leading questions led to an answer by the victim.¹⁴³

Rule 611(c) provides that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony."¹⁴⁴ However, the court noted that in *Williams v. State*,¹⁴⁵ the Indiana Supreme Court had held that some witnesses, "including children and young, inexperienced, and frightened witnesses, may be asked leading questions on direct examination to develop their testimony."¹⁴⁶ The court further noted that this answer was cumulative and not as unfairly prejudicial as other evidence that had been properly introduced on the same subject, and ruled against Riehle's appeal.¹⁴⁷

136. 636 N.E.2d 143, 148 (Ind. Ct. App. 1994), *aff'd*, 652 N.E.2d 490 (Ind. 1995).

137. 749 N.E.2d 552, 554 (Ind. Ct. App. 2001).

138. *Morrison*, 824 N.E.2d at 740-41.

139. *Id.* at 741.

140. *Id.*

141. 823 N.E.2d 287 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 746 (Ind. 2005).

142. *Id.* at 292.

143. *Id.* at 294.

144. IND. R. EVID. 611(c).

145. 733 N.E.2d 919 (Ind. 2000).

146. *Riehle*, 823 N.E.2d at 294 (citing *Williams*, 733 N.E.2d at 922).

147. *Id.*

B. Child Witnesses

In *Richard v. State*,¹⁴⁸ Richard appealed his conviction for dealing in marijuana.¹⁴⁹ His eight year old daughter had given a school counselor and a police officer detailed information regarding marijuana on Richard's property. Richard challenged the search warrant's probable cause because there was no basis to establish credibility of an eight-year-old informant.¹⁵⁰

The court recognized that there are two categories of informants, cooperative citizens and professional informants.¹⁵¹ Each type has its own requirements for determining credibility.¹⁵² In *Frasier v. State*,¹⁵³ the test for cooperative citizens was set forth: such information may be relied upon where there is no evidence calling the witnesses' motives into question.¹⁵⁴ However, the amount of evidence needed to determine credibility varies on a case-by-case basis.¹⁵⁵

The court further noted that the statute establishing a presumption against child witnesses was repealed in 1990, and the relevant rule is now found in Rule 601.¹⁵⁶ Rule 601 provides that "[e]very person is competent to be a witness except as otherwise provided in these rules or by act of the Indiana General Assembly."¹⁵⁷ Although a child's competency to testify at trial must be examined under the test set forth in *Harrington v. State*,¹⁵⁸ the threshold for using such statements for probable cause are more relaxed.¹⁵⁹ The court determined that probable cause had existed because the girl made statements with specificity, said she knew what marijuana looked like from being around it before, and made personal observations.¹⁶⁰

C. Separation of Witnesses

In *Hayden v. State*,¹⁶¹ Hayden had been an officer at a juvenile facility and

148. 820 N.E.2d 749 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 741 (Ind. 2005), *cert. denied*, 126 S. Ct. 1034 (2006).

149. *Id.* at 751.

150. *Id.* at 753-54.

151. *Id.* at 754.

152. *Id.*

153. 794 N.E.2d 449 (Ind. Ct. App. 2003).

154. *Id.* at 457.

155. *Richard*, 820 N.E.2d at 754. The court specifically noted that the fact that Richard was involved in a contentious custody dispute involving their other daughter was not an incriminating circumstance calling the girl's motives into question. *Id.* at 754 n.3.

156. *Id.* at 754.

157. IND. R. EVID. 601.

158. 755 N.E.2d 1176 (Ind. Ct. App. 2001).

159. *Richard*, 820 N.E.2d at 755.

160. *Id.* at 755-56. See also *Howard v. State*, 816 N.E.2d 948, 954-57 (Ind. Ct. App. 2004), *reh'g denied* (Ind. Ct. App. 2005), for additional discussion of establishing child witness competency.

161. 830 N.E.2d 923 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 184 (Ind. 2005).

was convicted of sexual misconduct with minors at the facility.¹⁶² On appeal, Hayden contended it was error for the trial court to allow the Superintendent of the facility to sit at the prosecution table before and after she testified, in violation of the separation of witnesses order.¹⁶³

Although Rule 615 does provide that, at a party's request, "the court shall order witnesses excluded so that they cannot hear the testimony of or discuss testimony with other witnesses,"¹⁶⁴ it exempts from exclusion under this rule an "officer or employee of a party that is not a natural person designated as its representative by its attorney."¹⁶⁵ In his appeal, Hayden claims that Indiana only recognizes police officers or detectives as exempt individuals.¹⁶⁶ The court noted that Hayden is correct inasmuch as that such officers have been found exempt.¹⁶⁷ However, the court noted that in the cases cited by Hayden, *Stafford v. State*¹⁶⁸ and *Heeter v. State*,¹⁶⁹ such officers were found exempt but there was no indication that other officers or employees could not qualify.¹⁷⁰ The court concluded that there was no error because the Superintendent was an employee of the State of Indiana and thus qualified for the exemption.¹⁷¹

D. Religious Beliefs in Child Custody

In *Pawlik v. Pawlik*,¹⁷² Joseph Pawlik lived with his parents.¹⁷³ During a custody dispute over his child, counsel for the mother had questioned Pawlik's mother regarding her practices and beliefs stemming from being a Jehovah's Witness. Pawlik claimed that this line of questioning violated Rule 610, which states that "[e]vidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that, by reason of their nature, the witness's credibility is impaired or enhanced."¹⁷⁴

The questions asked of Pawlik's mother were not designed to impugn her credibility, but rather to demonstrate what influence she may have on the child's religious upbringing.¹⁷⁵ While the court noted that Rule 610 applies in dissolution and custody hearings, it is not a complete bar to evidence about the

162. *Id.* at 926-27.

163. *Id.* at 927-28.

164. IND. R. EVID. 615.

165. *Id.*

166. *Hayden*, 830 N.E.2d at 928.

167. *Id.*

168. 736 N.E.2d 326, 330 (Ind. Ct. App. 2000).

169. 661 N.E.2d 612, 615 (Ind. Ct. App. 1996).

170. *Hayden*, 830 N.E.2d at 928.

171. *Id.*

172. 823 N.E.2d 328 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 747 (Ind. 2005).

173. *Id.* at 329.

174. IND. R. EVID. 610.

175. *Pawlik*, 823 N.E.2d at 333.

religious beliefs of parties seeking custody.¹⁷⁶ The rule only operates to bar such testimony where it is used to buttress or impugn the credibility of a witness.¹⁷⁷

E. Authenticating Prior Statements for Impeachment Purposes

In *LeFlore v. State*,¹⁷⁸ LeFlore argued that the State had improperly been allowed to use a transcript of a prior conversation to impeach a witness without authenticating the transcript first. Rule 613 provides that:

(a) Examining Witness Concerning Prior Statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to statements of a party-opponent as defined in Rule 801(d)(2).¹⁷⁹

LeFlore cited *Hightower v. State*¹⁸⁰ to support his contention that non-authenticated evidence may not be used for such purposes.¹⁸¹ However, in *Hightower*, the proponent of the document had been trying to have it admitted into evidence, and thus it was properly denied as unauthenticated.¹⁸² In the present case, the court found that because the State had not been offering the document for submission into evidence, but merely using it to impeach a witness, Rule 613 clearly allowed such use without authentication.¹⁸³

IV. EXPERT TESTIMONY

A. Rule 702 in FELA Actions

In *Norfolk Southern Railway Co. v. Estate of Wagers*,¹⁸⁴ Norfolk appealed the trial court's decision, which had been brought under the Federal Employer's

176. *Id.* at 334.

177. *Id.*

178. 823 N.E.2d 1205 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 744 (Ind. 2005).

179. IND. R. EVID. 613.

180. 735 N.E.2d 1209 (Ind. Ct. App. 2000).

181. *LeFlore*, 823 N.E.2d at 1213.

182. *Id.*

183. *Id.*

184. 833 N.E.2d 93 (Ind. Ct. App. 2005), *trans. denied* (Ind. 2006).

Liability Act (“FELA”).¹⁸⁵ The trial court had acknowledged that Norfolk had made compelling arguments that Estate’s expert testimony should have been excluded. However, the trial court ultimately found that FELA actions have a substantially more liberal standard of causation than standard common law actions.¹⁸⁶

Norfolk argued on appeal that the expert testimony was unreliable because it was not based on any specific information regarding Wager’s level of exposure to asbestos or diesel fumes.¹⁸⁷ However, the court concluded that the Estate had demonstrated the quantity of exposure by showing that Wager was exposed to the substances for a significant amount of time each work day for twenty-one years.¹⁸⁸ Although the testimony was not based on scientific or medical tests, the expert relied on the known carcinogenic effects of diesel fumes, his knowledge of related literature, and proof of sustained exposure to reach his conclusion on causation.¹⁸⁹ In conjunction with the liberal causation standard under FELA, the court determined that the testimony was admissible under Rule 702.¹⁹⁰

B. Expert Testimony on General Background

In *Ott v. AlliedSignal, Inc.*,¹⁹¹ Ott appealed the exclusion at trial of three physicians’ affidavits which had been excluded because they did not specifically deal with Mr. Ott. The court determined that the evidence should not have been excluded as it represented the prevailing medical view of the general way in which cancer develops.¹⁹² The evidence had not been offered to show the specific way in which Mr. Ott had developed cancer, and therefore it was reliable under Rule 702.¹⁹³

C. Expert Testimony on Eyewitness Identification

In *Farris v. State*,¹⁹⁴ Farris argued that the trial court erred when it refused to allow expert testimony regarding psychological phenomena that might cause a witness to misidentify a suspect.¹⁹⁵ The trial court had found that the witness was qualified to testify as an expert. However, his testimony was inadmissible under the Rules. The trial court had properly found the testimony inadmissible under Rule 704(b)¹⁹⁶ because it included conclusions that there existed potential

185. *Id.* at 99.

186. *Id.* at 101.

187. *Id.* at 104.

188. *Id.* at 108.

189. *Id.*

190. *Id.*

191. 827 N.E.2d 1144 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 187 (Ind. 2005).

192. *Id.* at 1150.

193. *Id.*

194. 818 N.E.2d 63 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 735 (Ind. 2005).

195. *Id.* at 67.

196. Rule 704(b) states that “[w]itnesses may not testify to opinions concerning . . . whether

sources of error that led the expert witness to question the veracity of the State's identification witnesses.¹⁹⁷

The court also found that the expert testimony had been correctly excluded under Rule 702.¹⁹⁸ Rule 702(a) states that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence . . . a witness qualified as an expert . . . may testify thereto in the form of an opinion or otherwise."¹⁹⁹ Because the identification witnesses were subject to cross-examination and argument from counsel, the expert opinion in this case would not have aided the jury in considering the identification testimony.²⁰⁰

On the last day of trial, Farris had sought to have the owner of the convenience store he robbed testify.²⁰¹ The trial court refused to allow the testimony because the owner did not appear on either party's witness list, and the owner had been in the courtroom while a separation of witnesses order was in effect. However, the owner had appeared as a material witness on the State's charging information. Farris sought to have the owner testify that money had been missing from the cash register the night before the robbery, and that the store had been robbed again shortly after the incident in question.²⁰²

The court held that it had been improper to exclude the store owner's testimony under the Sixth Amendment to the U.S. Constitution, which guarantees a defendant the right to present witnesses on his behalf.²⁰³ Although this right is not absolute and may be overcome by a showing of bad faith on the part of counsel or substantial prejudice to the State,²⁰⁴ neither of these qualifiers were present in this case. Farris's counsel claimed she called the owner but could not find him, and the State knew of his potential knowledge as it had listed him as a material witness in the charging information.²⁰⁵

The court also found that it was error to preclude the testimony on the basis of the separation of witnesses order.²⁰⁶ It noted that it is abuse of discretion to refuse to allow the testimony of a witness due to a separation of witnesses order if the proponent is without fault in the violation.²⁰⁷ Neither party had listed the owner as a potential witness, and Farris's counsel did not know what he looked like and had just learned of his potentially useful testimony on the last day of the trial. The State also argued that this evidence was irrelevant, but that the testimony could have indicated to the jury that an employee or third party had

a witness has testified truthfully." IND. R. EVID. 704(b).

197. *Farris*, 818 N.E.2d at 67.

198. *Id.* at 67-68.

199. IND. R. EVID. 702(a).

200. *Farris*, 818 N.E.2d at 68.

201. *Id.*

202. *Id.*

203. *Id.* at 69-70.

204. *See Williams v. State*, 714 N.E.2d 644, 651 (Ind. 1999).

205. *Farris*, 818 N.E.2d at 69-70.

206. *Id.* at 69.

207. *Id.*

actually committed the crime. The court acknowledged that the testimony had been improperly excluded, but the error was harmless because the weight of other evidence presented and the likelihood that the owner's testimony would not have been helpful to Farris.²⁰⁸

An additional issue raised on appeal by Farris regarding introduction of photo arrays involved an exchange at trial where the transcript failed to record the substance of the bench conference in which Farris objected to the photos. The transcript does indicate that Farris's objection was overruled. On appeal, the State argued that Farris had waived this issue under Indiana Appellate Rule 31, which states that if no "[T]ranscript of all or part of the evidence is available, a party or the party's attorney may prepare a verified statement of the evidence from the best available sources"²⁰⁹ However, the court agreed with Farris that this rule allows a party to submit such statement, but does not require it.²¹⁰ Since a transcript had been provided that made it clear Farris had objected in some form at trial, Farris had not waived this issue.²¹¹

D. "Garbology"

In *Leisure v. Wheeler*,²¹² Leisure appealed a ruling which did not allow her to modify custody or child support obligations.²¹³ Wheeler had hired an investigator, who testified that he collected garbage from Leisure's home for two weeks and the garbage included liquor bottles, cigarette boxes, fast food wrappers, rolling papers, and possible evidence of marijuana.²¹⁴

Leisure objected to this testimony on the basis that it was expert testimony without a proper foundation, and that any scientific principles underlying Garbology are not reliable. Although the investigator did refer to himself as an expert, the court ruled that the testimony was proper and that the testimony was not in the form of an opinion.²¹⁵ The investigator had made it clear he did not see the items in use and that he was not saying how anyone lived, but rather he was simply listing items that he discovered in Leisure's garbage. Because this was not opinion testimony, its admission did not violate Rule 702.²¹⁶

208. *Id.* at 69-70.

209. IND. APP. R. 31.

210. *Farris*, 818 N.E.2d at 70-71.

211. *Id.*

212. 828 N.E.2d 409 (Ind. Ct. App. 2005).

213. *Id.* at 411.

214. *Id.* at 417-18.

215. *Id.* at 418.

216. *Id.* In other words, you do not need to be a genius to go through someone's trash and produce an inventory list. Although the court found that the testimony was not admitted erroneously, it refused to place its "Imprimatur" on this type of investigative work. *Id.*

E. Lay Opinion Testimony

In *Smith v. State*,²¹⁷ Smith argued that the trial court had erroneously allowed a police officer to testify as to what a suspect appeared to be doing on a surveillance tape taken from the police station.²¹⁸ While left alone prior to questioning, Smith had been videotaped and the officer testified at trial that she appeared to be removing drug buy money from her vagina. Smith argues that this testimony was allowed in violation of Rule 701 because the State failed to show it should be allowed as lay opinion testimony.²¹⁹

Rule 701 provides that “[i]f the witness is not testifying as an expert, the witness’s testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue.”²²⁰ Smith argued that as the evidence was a videotape, the officer’s testimony was simply a lay opinion and improperly interfered with the jury’s interpretation of the video.²²¹

The court disagreed, and pointed out that the detective had been a police officer for thirteen years and a drug task force member for over three years, that she had received specific drug law enforcement training, and that she had participated in numerous drug buys as a police officer.²²² The court concluded that the detective therefore possessed a level of knowledge beyond that of an average juror and that her testimony was based on her rational perceptions of Smith’s actions and the drug culture in general.²²³

In *Prewitt v. State*,²²⁴ Prewitt claimed that the victim had committed suicide. The victim’s father testified at trial that his son would not have contemplated suicide.²²⁵ Prewitt contends that Rule 701 prohibits such testimony. However, the court found that the father had testified in great detail about the close relationship he had with his son and that this closeness allowed the father to testify about his son’s thoughts on suicide; the father’s opinions were based on a rational perception and a greater level of knowledge than the average lay observer would have of his son’s views on suicide.²²⁶ Because Prewitt’s defense was that the victim had committed suicide, the father’s testimony was helpful to the jury in determining guilt or innocence.²²⁷

217. 829 N.E.2d 64 (Ind. Ct. App. 2005).

218. *Id.* at 72.

219. *Id.*

220. *Id.* at 73; IND. R. EVID. 701.

221. *Smith*, 829 N.E.2d at 72-73.

222. *Id.* at 73.

223. *Id.*

224. 819 N.E.2d 393 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 739 (Ind. 2005).

225. *Id.* at 414.

226. *Id.* at 414-15.

227. *Id.* at 415.

F. Testifying as to the Credibility of Another Witness

In *Prewitt*, Prewitt also claimed that an expert witness for the State had improperly testified as to the truthfulness of Prewitt's statements.²²⁸ Prewitt had claimed that she was in bed five to ten feet from the bathroom where the victim was murdered and that she had not heard any gunshot. The expert had testified at trial that he had "a very difficult time believing or understanding that a gunshot in a bathroom where you have tiles, which would cause reverberation" would not have been heard by someone five to ten feet away.²²⁹ Prewitt claimed this was a violation of Rule 704(b) which states that "[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions."²³⁰

The State had acknowledged that the witness was not a firearms expert, but that he was a forensic pathologist and a professor of criminology and that both of those fields require knowledge of firearms beyond that of normal laypersons. The expert was simply testifying as to the likelihood that a person five to ten feet away would have heard a gunshot.²³¹ The court found no error here as this testimony simply goes to the jury for assignment of weight in examining the testimony of Prewitt and the expert.²³²

G. Expert Testifying as to Underlying Information

In *Schmidt v. State*,²³³ Schmidt appealed his conviction for Operating While Intoxicated.²³⁴ At trial, Schmidt had been prevented from offering expert testimony as to his level of intoxication when the expert planned to use underlying data, such as Schmidt's height, weight, and amount and type of alcohol he had consumed. Schmidt contended that the expert could testify as to this underlying data because it was the type of information on which such a professional would rely in the normal course of conducting his business.²³⁵

Rule 705 provides that an "expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."²³⁶ Furthermore, Rule 703 states that

[t]he facts or data in the particular case upon which an expert bases an

228. *Id.* at 413.

229. *Id.*

230. IND. R. EVID. 704(b).

231. *Prewitt*, 819 N.E.2d at 414.

232. *Id.*

233. 816 N.E.2d 925 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 743 (Ind. 2005).

234. *Id.* at 928-29.

235. *Id.* at 937.

236. IND. R. EVID. 705.

opinion or inference may be those perceived by or made known to the expert at or before the hearing. Experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field.²³⁷

The court agreed with the State that allowing this type of reliance would be unfair as the defendant did not testify, and this could simply allow the defendant's version of events to enter into evidence via the expert's testimony about information passed to him by Schmidt prior to trial.²³⁸ The court stated that the expert testimony was properly excluded unless and until Schmidt testified, placing the information into the record for use by the expert.²³⁹ The exceptions set forth in Rules 703 and 705 were intended for professionals to utilize the work of other professionals, such as a medical doctor relying upon the findings of an X-Ray technician.²⁴⁰ The exceptions were not intended to allow facts at issue to enter by having a party disclose them to an expert witness prior to trial.²⁴¹

H. The Unproven Theory

In *Smith v. Yang*,²⁴² Smith appealed the judgment against her on grounds that her expert testimony had been improperly prohibited at trial.²⁴³ Yang had been granted summary judgment on the issue of causation as Smith had presented no evidence that she had not crossed the center line of the road and struck Yang's vehicle. Yang had presented evidence that Smith had crossed the center line.²⁴⁴

Smith had offered expert testimony regarding the "faked left syndrome" in which a vehicle crosses the center line of the road, the second vehicle swerves to the far left to avoid an accident and the original vehicle corrects back right-of-center prior to impact. In this scenario, physical evidence would support a finding that Smith had indeed crossed the center line, but it would have been in avoidance of Yang initially crossing the center line. Other than this expert testimony, there was no other evidence offered that Yang had crossed the center line.²⁴⁵

In order to determine admissibility of expert testimony, the court must examine Rule 702(b), which states that expert testimony is only admissible when "the court is satisfied that the scientific principles upon which the expert testimony rests are reliable."²⁴⁶ Although there is no specific test for reliability under the Rules, the Indiana Supreme Court has stated that Indiana courts may

237. IND. R. EVID. 703.

238. *Schmidt*, 816 N.E.2d at 939.

239. *Id.*

240. *Id.*

241. *Id.*

242. 829 N.E.2d 624 (Ind. Ct. App. 2005).

243. *Id.* at 625.

244. *Id.*

245. *Id.* at 626.

246. *Id.*; IND. R. EVID. 702(b).

consider the “Five Daubert Factors” in determining reliability.²⁴⁷

In the present case, the court found the “faked left syndrome” lacking under the Daubert factors.²⁴⁸ There was no evidence that the theory had been tested, or that it had been subjected to “substantial peer review.”²⁴⁹ There was only one article on the theory, and it had been published in 1988. There was no evidence about this periodical’s circulation, and there was no objective evidence to support this theory as generally accepted as a reliable theory. The expert also failed to present any evidence on the rate of error under this theory.²⁵⁰ Although the expert was highly qualified according to his credentials and experience, there was almost no evidence that the faked left theory was credible, reliable, or widely accepted, and the trial court had properly denied the use of the testimony.²⁵¹

I. Does the Expert Testimony Assist the Trier of Fact?

In *F.A.C.E. Trading, Inc. v. Carter*,²⁵² F.A.C.E. appealed a determination that some of its products were illegal gaming devices under Indiana law. F.A.C.E. contended that it was improperly prevented from offering expert testimony regarding the legality of the devices.²⁵³

F.A.C.E. had offered the testimony of two individuals who were experts on the contention that the devices were clearly not illegal under Michigan law and that the Michigan and Indiana laws were precisely the same. The trial court did not give a reason for striking the affidavits of these experts.²⁵⁴

Rule 702(a) provides that expert testimony may be utilized if it “will assist the trier of fact to understand the evidence or to determine a fact in issue.”²⁵⁵ The court found that Michigan and Indiana law differ quite significantly, and therefore the expert testimony from experts on Michigan law would not be helpful to the trier of fact.²⁵⁶

Also worth mentioning here is *Mullins v. Parkview Hospital, Inc.*²⁵⁷ In this

247. *Smith*, 829 N.E.2d at 626-27; *see McGrew v. State*, 682 N.E.2d 1289, 1292 (Ind. 1997). The U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993), stated the factors to be considered: (1) whether the theory or technique at issue can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique’s operation; and (5) whether the technique is generally accepted within the relevant scientific community. *Id.*

248. *Smith*, 829 N.E.2d at 629.

249. *Id.*

250. *Id.*

251. *Id.* In other words, no matter how smart you are, you can’t make stuff up.

252. 821 N.E.2d 38 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 745 (Ind. 2005).

253. *Id.* at 43.

254. *Id.* at 44.

255. IND. R. EVID. 702(a).

256. *F.A.C.E. Trading*, 821 N.E.2d at 44.

257. 830 N.E.2d 45 (Ind. Ct. App. 2005), *reh’g denied*, 830 N.E.2d 45 (Ind. Ct. App. 2006).

case, a patient had instructed her doctor that she did not want any student learners present during her procedure.²⁵⁸ The patient also crossed out language on the consent form regarding authorization for student learners, and completed a second authorization form which specifically restricted patient interaction to authorized personnel. During the procedure an EMT student was allowed to attempt multiple intubations, causing an injury.²⁵⁹

A Medical Review Panel found all defendants had acted properly. The Mullinses failed to respond to this determination with expert testimony in opposition to that presented by the defendants. On appeal, the Mullinses argued that no expert testimony was necessary to understand that consent had not been given for a student learner to perform the procedure. The court found that retrial was warranted as to the individual physician, anesthesiologist, and student learner and their employers, but as to the hospital and university defendants, summary judgment was upheld because expert testimony was indeed required to understand the internal working, procedures, and standard practices of a hospital in situations involving student learners.²⁶⁰

J. Expert Testimony on Legal Conclusions

In *Kelly v. Levandoski*,²⁶¹ a lawyer had asked a towing company to store a client's automobile pending outcome of a case.²⁶² Years later, the clients failed to pay the fees after they received resolution of the case. The towing company sued the lawyer to recover, and the trial court held that the normal rule relieving agents acting in the scope of their duties from personal liability does not extend to attorneys who are managing a client's lawsuit. The lawyer attempted to have another lawyer testify as an expert witness regarding whether a contract was formed and various other legal issues.²⁶³

Rule 704(b) provides that a witness may not testify "to opinions concerning . . . legal conclusions."²⁶⁴ The court found that expert testimony on legal issues had been properly excluded at trial, although it would have been proper for the witness to testify as to procedures which are normal for attorneys to take in such cases.²⁶⁵

258. *Id.* at 49.

259. *Id.* at 50-51.

260. *Id.* at 58. The court cited *Perry v. Driehorst*, 808 N.E.2d 765, 768 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 982 (Ind. 2004), for its proposition that failure to offer expert testimony will usually cause the plaintiff's case to fail unless the deviation from standards of care is clear to lay people. *Mullins*, 830 N.E.2d at 57.

261. 825 N.E.2d 850 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 179 (Ind. 2005).

262. *Id.* at 854.

263. *Id.* at 863.

264. *Id.*; IND. R. EVID. 704(b).

265. *Kelly*, 825 N.E.2d at 864-65.

V. HEARSAY

A. *Probable Cause Affidavit is Hearsay*

In *Rhone v. State*,²⁶⁶ Rhone appealed his conviction for reckless homicide.²⁶⁷ The only evidence offered at trial which supported a key element of this crime was the probable cause affidavit issued in the homicide case. Rhone argued on appeal that this document was hearsay and should not have been admitted.²⁶⁸

The Indiana Court of Appeals agreed that the evidence was hearsay because Rule 801(c) states that “[h]earsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”²⁶⁹ The court also noted that “[h]earsay is generally not admissible unless it fits into one of the exceptions delineated in the evidence rules.”²⁷⁰

The State argued that the affidavit was admissible under the public records exception, Rule 803(8).²⁷¹ The court noted that Rule 803(8) concludes with the caveat that this exception to the hearsay rule does not apply to: “factual findings offered by the government in criminal cases.”²⁷² The court then applied the test set forth by the Indiana Supreme Court in *Ealy v. State*,²⁷³ which states that the Rule 803(8) exception cannot apply where the evidence contains findings that address a materially contested issue, contains conclusions drawn by an investigator (rather than simple listings of facts), and the document was prepared for advocacy purposes or in anticipation of litigation.²⁷⁴ Since all three of these factors applied to the probable cause affidavit against Rhone, it should not have been admitted at trial.²⁷⁵ Although the conviction was overturned, the court noted that the State was not barred from retrial because the Indiana Supreme Court has held that if all “the evidence, even that erroneously admitted, is

266. 825 N.E.2d 1277 (Ind. Ct. App.), *reh’g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 183 (Ind. 2005).

267. *Id.* at 1280.

268. *Id.*

269. *Id.* at 1282-83 (quoting IND. R. EVID. 801(c)).

270. *Id.* (citing IND. R. EVID. 802).

271. *Id.* Rule 803(8) provides that

[u]nless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations in any form, of a public office or agency, setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law are not excluded by the hearsay rule.

IND. R. EVID. 803(8).

272. *Rhone*, 825 N.E.2d at 1283 (quoting IND. R. EVID. 803(8)(c)).

273. 685 N.E.2d 1047 (Ind. 1997).

274. *Id.* at 1054.

275. *Rhone*, 825 N.E.2d at 1284.

sufficient to support the jury verdict, double jeopardy does not bar a retrial on the same charge.”²⁷⁶

B. Avoiding Hearsay by Manifesting an Adoption or Belief in Truth

In *Collins v. State*,²⁷⁷ Collins appealed in part based on admission at trial of a taped statement made by Collins.²⁷⁸ This tape included statements made by another party, implying guilt on Collins’s part, after which Collins changed his story to an accidental shooting. Collins argued that the portion of the recording which includes statements by another party were inadmissible because the speaker did not testify and was not available for cross-examination. The State argued that the testimony was admissible as a statement by a party opponent because Collins had manifested an adoption or belief in its truth. The State claimed that since he changed his story to admit responsibility for the shooting after hearing the accusation on the earlier recording, Collins had adopted the statement as truthful.²⁷⁹

Rule 801(d)(2)(b) does allow for such an adoption by stating that a statement is not hearsay if it is “offered against a party and is . . . (B) a statement of which the party has manifested an adoption or belief in its truth.”²⁸⁰ However, the court ordered a new trial on the murder charge because Collins had clearly not adopted the characterization of the earlier recording that he had committed murder; he claimed it was an accidental shooting.²⁸¹ Because this evidence was not cumulative or of minor impact, a new trial on this charge was required.²⁸²

C. Excited Utterance

In *Fowler v. State*,²⁸³ Fowler appealed his conviction for domestic battery, in part claiming that statements made by his wife were inadmissible hearsay and that this was the only evidence supporting his conviction.²⁸⁴ Rule 803(2) does allow for an exception to the hearsay rule for “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”²⁸⁵

The court noted that, in order for a statement to be admitted under Rule 803(2), “three elements must be shown: (1) a startling event, (2) a statement

276. *Id.* at 1285 (internal quotation marks omitted) (quoting *Carpenter v. State*, 786 N.E.2d 696, 705 (Ind. 2003)).

277. 826 N.E.2d 671 (Ind. Ct. App.), *reh’g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 185 (Ind. 2005), *cert. denied*, 126 S. Ct. 1058 (2006).

278. *Id.* at 676-77.

279. *Id.* at 678-79.

280. IND. R. EVID. 801(d)(2)(B).

281. *Collins*, 826 N.E.2d at 679.

282. *Id.* at 680.

283. 829 N.E.2d 459 (Ind.), *reh’g denied* (Ind. 2005).

284. *Id.* at 463.

285. IND. R. EVID. 803(2).

made by a declarant while under the stress of excitement caused by the event, and (3) that the statement relates to the event.”²⁸⁶ In this case, the police officer had testified that no more than fifteen minutes had passed between a 911 call and the victim making the statement, the victim was crying, claimed to be in pain, had trouble catching her breath, and was bleeding. Therefore, the court found it reasonable that the victim was still under the stress of the event in question when the statements were made to police, and agreed that the evidence had been properly admitted as an excited utterance.²⁸⁷

In *D.G.B. v. State*,²⁸⁸ D.G.B. appealed his adjudication as a delinquent for crimes that, if committed by an adult, would constitute child molestation and intimidation.²⁸⁹ The victim was a six-year old girl who blurted out the accusations to her mother while being treated at the hospital for vaginal injuries. The girl later repeated the allegations for a police officer, but was unable to testify at an admissibility hearing. The statements made to her mother and to the police officer had been admitted at trial.²⁹⁰

Although the statements made to the police officer had been admitted at trial pursuant to the protected persons statute, the court found that this was error as the victim was not available for cross-examination at the admissibility hearing and did not testify at trial.²⁹¹ The statements made to her mother at the hospital had been properly admitted under the excited utterance exception.²⁹²

Although the incident had occurred earlier that day, and the statement would most likely not qualify if made by an adult, circumstances led the court to conclude that the statement was an excited utterance.²⁹³ The girl found that she was bleeding profusely, had to be rushed to the hospital, was subjected to surgery, and upon waking from surgery saw a fork and knife (instruments used to mutilate her genitalia). She had also been threatened with being burned on a grill and fed to a dog if she revealed what happened. The court determined that due to her young age and having been subjected to surgery, it is unlikely that the victim had an opportunity for thoughtful reflection prior to making the statements to her mother.²⁹⁴ Although the statements made at the police station did not qualify as excited utterances, the information was merely cumulative and its introduction at trial was not error.²⁹⁵

The excited utterance exception was also at issue in *Hammon v. State*.²⁹⁶ The

286. *Fowler*, 829 N.E.2d at 463 (citing *Yamobi v. State*, 672 N.E.2d 1344, 1346 (Ind. 1996)).

287. *Id.* at 463-64.

288. 833 N.E.2d 519 (Ind. Ct. App. 2005).

289. *Id.* at 523-24.

290. *Id.* at 524-25.

291. *Id.* at 525.

292. *Id.* at 526.

293. *Id.*

294. *Id.*

295. *Id.* at 526-27.

296. 829 N.E.2d 444 (Ind.), *cert. granted sub nom.* *Hammon v. Indiana*, 126 S. Ct. 552 (2005).

court discussed the fact that, unlike most other jurisdictions, Indiana has no provision similar to Federal Rule of Evidence 807, which allows additional hearsay evidence not enumerated in Rules 803 and 804 if the evidence has equivalent circumstantial guarantees of trustworthiness, is offered as evidence of a material fact, and is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and the general purpose of the rules and the interests of justice would be served by admitting the evidence.²⁹⁷

The court noted that in Indiana, the excited utterance exception has been interpreted broadly to permit admission of trustworthy statements under the *Yamobi* factors.²⁹⁸ The court concluded that in this case, the evidence would have been admissible. The court went on to consider *Crawford v. Washington*²⁹⁹ and Confrontation Clause issues and ultimately determined that any error under these standards was harmless.³⁰⁰ It is worth noting that certain statements that may be admissible under the Indiana Rules may not be sufficient under the United States Supreme Court decision in *Crawford*.³⁰¹ *Hammon* was granted certiorari by the U.S. Supreme Court on October 31, 2005, and may be pivotal for future cases involving hearsay in domestic abuse cases.³⁰² This includes decisions such as *Gamble v. State*,³⁰³ where the court determined that 911 tapes were not testimonial in nature and thus their admission did not violate *Crawford* in light of the Indiana Supreme Court's decision in *Hammon*.³⁰⁴

297. *Id.* at 448 (citing FED. R. EVID. 807).

298. *Id.* at 449.

299. 541 U.S. 36 (2004). In *Crawford*, the U.S. Supreme Court held that testimonial out of court statements may not be introduced in a criminal trial where the defendant had no opportunity to cross-examine the person who made the statements.

300. *Hammon*, 829 N.E.2d at 459.

301. *See id.* at 446. The Indiana Supreme Court distinguished the present case from *Crawford* by holding that

statements to investigating officers in response to general initial inquiries are nontestimonial but statements made for purposes of preserving the accounts of potential witnesses are testimonial. More generally, we conclude that testimonial statements are those where a principal motive of either the person making the statement or the person or organization receiving it is to preserve it for future use in legal proceedings.

Id.

302. *See Hammon v. Indiana*, 126 S. Ct. 552 (2005). The U.S. Supreme Court reversed and remanded this case on June 19, 2006, stating that "absent a finding of forfeiture by wrongdoing, the Sixth Amendment operates to exclude Amy Hammon's affidavit. The Indiana courts may (if they are asked) determine on remand whether such a claim of forfeiture is properly raised and, if so, whether it is meritorious." *Davis v. Washington*, 126 S. Ct. 2266, 2280 (2006).

303. 831 N.E.2d 178 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 184 (Ind. 2005).

304. *Id.* at 181-83; *see also Beach v. State*, 816 N.E.2d 57 (Ind. Ct. App. 2004), *abrogated by Hammon v. State*, 829 N.E.2d 444 (Ind. 2005).

D. Question or Instruction as Hearsay

In *Lampitok v. State*,³⁰⁵ Lampitok argued that the trial court had improperly admitted testimony of a witness who claimed that a participant had telephoned her and asked her to get rid of the gun.³⁰⁶ The trial court had agreed with the prosecution that as long as the statement made to the witness was a question or an instruction, it was not hearsay because it was not offered to prove the truth of the matter asserted.³⁰⁷

Rule 801(c) states that “‘hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”³⁰⁸ The court referred to *Vertner v. State*³⁰⁹ for its proposition that when an out of court statement is challenged as hearsay, it must be determined if the statement asserts a fact capable of being true or false, and if it contains no such assertion it cannot be hearsay.³¹⁰ However, the court stated that it did not agree that an assertion can never be found in a command or a question.³¹¹ The command to dispose of the gun is a factual assertion that there was actually a gun and that it was relevant to the crime.³¹² Because this was an issue at trial, the utterance was used in order to prove the truth of the matter asserted and was inadmissible hearsay.³¹³ Although the court found error in the statement’s admission, it was harmless error.³¹⁴

VI. INEFFECTIVE ASSISTANCE OF COUNSEL: FAILURE TO OBJECT

In *Smith v. State*,³¹⁵ Smith contended on appeal that he had received ineffective assistance of counsel because counsel had failed to object to a statement made at trial by a prosecution witness that he believed the statements of another person.³¹⁶ This statement would be prohibited by Rule 704(b), which prohibits testimony on “opinions concerning intent, guilt, or innocence in a criminal case . . . [or] whether a witness has testified truthfully.”³¹⁷

Smith’s counsel had not objected to this testimony. However counsel did explain later that a tactical decision was made not to object to the statement in

305. 817 N.E.2d 630 (Ind. Ct. App. 2004), *reh’g denied* (Ind. Ct. App. 2005), *trans. denied*, 831 N.E.2d 739 (Ind. 2005).

306. *Id.* at 639.

307. *Id.*

308. *Id.*; IND. R. EVID. 801(c).

309. 793 N.E.2d 1148, 1151 (Ind. Ct. App. 2003).

310. *Lampitok*, 817 N.E.2d at 639-40.

311. *Id.* at 640.

312. *Id.*

313. *Id.*

314. *Id.* The court cited *Carter v. State*, 766 N.E.2d 377, 382 (Ind. 2002) for its holding that “an utterance in the form of a question can in substance contain an assertion of a fact.” *Id.*

315. 822 N.E.2d 193 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 741 (Ind. 2005).

316. *Id.* at 202.

317. IND. R. EVID. 704(b).

order to avoid drawing attention to it.³¹⁸ The court noted that the Indiana Supreme Court has recognized this as a legitimate trial strategy in *Conner v. State*.³¹⁹ Therefore, failure to object to this testimony did not constitute ineffective assistance of counsel.³²⁰

CONCLUSION

The Rules have now been in effect for more than twelve years. As new fact patterns are appealed, new statutes are enacted, and the Federal Rules of Evidence continue to interact with Indiana law, the interpretation of the Rules continues to be refined. Students of Indiana Evidence law can observe major decisions regarding interpretation of the Rules on a regular basis. The upcoming decision by the U.S. Supreme Court regarding the *Hammon* case may prove pivotal for the excited utterance rule in Indiana in domestic abuse circumstances.

Unfortunately, there is no reasonable expectation on the horizon that criminal cases or civil litigation will decrease significantly anytime in the near future. This makes proper understanding of the Rules critical to provide all parties with a level playing field to make their case at trial.

Although no set of rules can ever anticipate all possible fact patterns with specificity, the Rules have now been in place long enough for many of the questions regarding which portions of the common law survived enactment of the Rules and how the Rules interact with the Federal Rules of Evidence to begin to be explored.

318. *Smith*, 822 N.E.2d at 205.

319. 711 N.E.2d 1238, 1250 (Ind. 1999).

320. *Smith*, 822 N.E.2d at 205. The Indiana Court of Appeals has found ineffective assistance of counsel in other recent cases. See *Carew v. State*, 817 N.E.2d 281 (Ind. Ct. App. 2004).

RECENT DEVELOPMENTS: INDIANA FAMILY LAW

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INTRODUCTION

During the survey period, at least sixty Indiana appellate decisions were published involving the broad topic known as Family Law.¹ This Article is primarily limited to a review of Indiana Appellate Court decisions during the survey period which advance, clarify, or raise further questions regarding the state's body of family law, particularly the commonly recognized subjects of dissolution of marriage, paternity, child custody, support, and adoption. A significant piece of legislation that permits arbitration in certain family law cases was enacted during the survey period and will be discussed.

I. DISSOLUTION OF MARRIAGE

The following discussion considers some cases of note involving the topics of property distribution, spousal maintenance, marital agreements, and other matters in the context of dissolution of marriage.

A. *Property Distribution*

1. *Marital Property Issues.*—The first of the three primary questions involved in marital asset distribution concerns the definition of marital property. The other two questions involve the valuation of the property and how it is to be

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1. Ten articles of title 31 of the Indiana Code are specifically referred to as family law. IND. CODE § 31-11 to -31-20 (2004). Those articles cover marriage, domestic relations courts, the parent-child relationship, establishment of paternity, dissolution of marriage and legal separation, support of children and other dependents, custody and visitation rights, the Uniform Interstate Family Support Act, adoption, and human reproduction. Title 31 also contains an article of general provisions and an article consisting of 149 sections of definitions pertaining to both family and juvenile law. An additional eleven articles of title 31 are specifically referred to as "juvenile law." See IND. CODE § 31-9-2-72 (2004) ("‘Juvenile law’ refers to [IND. CODE §] 31-30 [to] . . . 31-40."). Also, every legal proceeding in Indiana between parents involving child support or visitation with their children is governed by the Indiana Supreme Court's Child Support Rules and Guidelines and Parenting Time Guidelines. Throughout an additional fifteen other titles of the Indiana Code are provisions governing criminal offenses against children and the family, children's protection services, marriage and family therapists, and trust and fiduciaries. Federal legislation involving taxation, bankruptcy, and retirement benefits can be a consideration in virtually any property settlement. Other federal legislation impacts Native American adoptions, parental kidnapping, and state enforcement of child support obligations.

distributed. Indiana courts have referred to asset distribution as a two-step process, involving a determination of the marital estate and its division.² It is really more involved than that. Determining marital property sometimes involves a determination of whether something is in fact property and, if so, whether it is a marital asset. Many cases involving valuation of assets attest to the significance of that question. The marital property and valuation questions necessarily affect the final question—distribution.³

*In re Marriage of Nickels*⁴ demonstrates the persistent desire of litigants to exclude property from the marital estate at the time of the divorce (rather than at the beginning of the marriage) and exemplifies Indiana's all-inclusive marital property law. In *Nickels*, the husband and wife both brought real estate into the marriage which they retitled to themselves as entireties property.⁵ In addition, the wife inherited a substantial sum of money from her parents' estate prior to the marriage, which amount was distributed after the date of marriage and placed into a joint account.⁶ The wife had accumulated nearly twenty-six years of credit toward her pension at the time of the parties' marriage. The wife appealed the trial court's division of assets.

Among other claims, the wife argued that the trial court erred by including the entire value of her pension and not just the portion that accumulated during the marriage.⁷ On appeal the court reiterated Indiana's unified pot theory of marital property: "All property, whether acquired before or during the marriage, is generally included in the marital estate for property division. This 'one pot theory specifically prohibits the exclusion of any assets from the scope of the trial court's power to divide and award.'"⁸

2. *Gard v. Gard*, 825 N.E.2d 907, 911 (Ind. Ct. App. 2005) (citing *Thompson v. Thompson*, 811 N.E.2d 888, 912-13 (Ind. Ct. App. 2004)).

3. See generally Robert J. Levy, *Introduction to Divorce-Property Issues*, 23 FAM. L.Q. 147 (1989).

4. 834 N.E.2d 1091 (Ind. Ct. App. 2005).

5. *Id.* at 1096.

6. *Id.* at 1094, 1098.

7. *Id.* at 1097-98.

8. *Id.* at 1098 (internal citations and quotation marks omitted) (quoting *Wyzard v. Wyzard*, 771 N.E.2d 754, 757 (Ind. Ct. App. 2002)). The Indiana Code defines "property" for purposes of dissolution of marriage as "all the assets of either party or both parties, including" current pension payments and the right to receive in the future vested retirement benefits. IND. CODE § 31-9-2-98(b) (2005). The Code provides:

In an action for dissolution of marriage under IC 31-15-2-2, the court shall divide the property of the parties whether:

- (1) owned by either spouse before the marriage;
- (2) acquired by either spouse in his or her own right:
 - (A) after the marriage; and
 - (B) before final separation of the parties; or,
- (3) acquired by their joint efforts.

IND. CODE § 31-15-7-4(a). Thus, a spouse may not select which of the parties' assets are to be

In short, the wife contended that only the portion of the pension that accrued during the marriage should have been subject to division. She argued effectively that the trial court should have used a “coverture fraction” to exclude the premarital portion of her pension.⁹ The court quickly disposed of the wife’s argument on appeal because she

refers us to no authority standing for the proposition that a trial court must use a coverture fraction formula to distribute a pension or retirement plan. Moreover, while a trial court may set aside to one party the value of a marital asset where the other party made no contribution to its acquisition, it is not required to do so.¹⁰

*Magee v. Garry-Magee*¹¹ presents a question of first impression regarding whether a valuable tax right should be included in the marital estate.¹² In *Magee*, the parties executed a prenuptial agreement prior to the date of their marriage which included, among other matters, a provision that the parties would file joint income tax returns during the marriage if to do so would produce the smallest amount of aggregate tax.¹³ One of the wife’s contentions on appeal was that the trial court erred by requiring her to reimburse the husband for his increased tax liability caused by her refusal to file joint tax returns in 2002.¹⁴ Apparently, the wife accumulated a tax loss carryover through stock transactions in the wife’s brokerage account, which account was her separate property according to the premarital agreement. The wife’s refusal to file joint tax refunds deprived the husband of the tax reduction he could have received by claiming the losses. The wife argued that the trial court erred by subordinating the separate property provision of the agreement to the provision requiring joint tax returns where a tax savings would be realized.¹⁵ The court noted that whether “a tax loss carryover is property that could be subject to allocation in dissolution proceedings . . .

considered marital property, absent a valid premarital agreement. *See* *Huber v. Huber*, 586 N.E.2d 887, 889 (Ind. Ct. App. 1992).

9. The court explained that a coverture fraction is just one method that a court may use to distribute pension benefits to the earning and the non-earning spouses. The numerator of the coverture fraction “is the period of time during which the marriage existed [while pension rights were accruing] and the denominator is the total period of time which the pension rights accrued.” *In re Marriage of Nickels*, 834 N.E.2d at 1098 & n.2 (citing *In re Marriage of Preston*, 704 N.E.2d 1098, 1098 (Ind. Ct. App. 1999)). The total value of the pension is multiplied by the coverture fraction to determine the value accrued during the marriage. *Id.* Using the coverture fraction litigants typically argue that the premarital portion should be distributed to them and that the marital portion should be distributed in specific portions between the parties.

10. *In re Marriage of Nickels*, 834 N.E.2d at 1098 (citing *In re Marriage of Pully*, 652 N.E.2d 528, 530 (Ind. Ct. App. 1995)).

11. 833 N.E.2d 1083 (Ind. Ct. App. 2005).

12. *Id.* at 1086, 1092.

13. *Id.* at 1086.

14. *Id.* at 1092.

15. *Id.* at 1093.

presents a matter of first impression in Indiana.”¹⁶ The court also “agree[d] . . . that a tax loss carryover is property subject to distribution in a dissolution proceeding under [Indiana Code section] 31-15-7-4.”¹⁷

The court also held that the trial court properly construed the premarital agreement. The agreement would have reserved the tax loss carryover entirely to the wife, but for the provision that the exclusion of separate property from marital property was specifically made subject to the provision that the parties file joint tax returns if that would achieve the greatest tax savings.¹⁸

The Indiana Supreme Court has clarified property settlement law as it relates to personal injury awards for damages occurring during the marriage versus awards for future lost wages. The question presented in *Beckley v. Beckley*¹⁹ was whether an award of benefits under the Federal Employer’s Liability Act (“FELA”) was a part of the marital estate subject to distribution.²⁰

In *Beckley*, the husband was injured in a work-related accident while employed by a railroad. He settled his claim under FELA, which covers employees of common carrier railroads for such accidents, for a lump sum in the amount of \$175,000. Four months later, the wife filed a petition for dissolution of marriage. The trial court, having included all of the settlement in the marital estate, gave seventy-five percent of it to the husband and a quarter to the wife. Overall, the husband received sixty-nine percent of the estate and the wife received thirty-one percent.²¹ On appeal, the wife complained about the unequal distribution and the husband complained about inclusion of any of the settlement in the marital estate because he claimed the settlement was for future lost wages.²²

The trial court had included all of the FELA award in the marital estate despite the fact that the award represented damages for both pain and suffering and future lost wages. The court of appeals remanded the case to the trial court with instructions to determine what portion of the FELA award represented compensation for damages occurring during the marriage and what portion represented future lost wages.²³ It held that only that portion representing compensation is divisible as a marital asset. The Indiana Supreme Court affirmed the trial court even though it agreed with the court of appeals because it reasoned that compensation for future lost wages is not a vested property interest subject to distribution in a dissolution of marriage.²⁴

The supreme court began its analysis with two equally well-established propositions: (1) Indiana statutes define “property” as all the assets of either or

16. *Id.* at 1092.

17. *Id.*

18. *Id.* at 1093.

19. 822 N.E.2d 158 (Ind. 2005).

20. *Id.* at 160.

21. *Id.*

22. *Id.*

23. *Id.*; see *Beckley v. Beckley*, 790 N.E.2d 1033, 1037 (Ind. Ct. App. 2003).

24. *Id.* at 162-63.

both parties and (2) earnings after the marriage are not marital property.²⁵

The husband in *Beckley* contended that FELA was similar to Indiana's Workers' Compensation Act and, thus, his FELA settlement should not be included as part of the marital estate subject to distribution. The supreme court acknowledged that FELA, like Indiana's Workers' Compensation Statute, was designed to shift the cost of work injuries and death from the employee to the employer.²⁶ However, the court went on to note "important distinctions between the two systems."²⁷ Notably, federal courts have steadfastly maintained that FELA is not a worker's compensation law but a negligence statute.²⁸ Additionally, Indiana's Workers' Compensation Statute provided benefits regardless of fault, so long as the injury arose out of and in the course of employment.²⁹ FELA, on the other hand, imposes liability only where the injuries are the result of negligence.³⁰ Most importantly for the court, an award under FELA may include damages for pain and suffering.³¹

The court then went on to announce a holding that arguably applies to all personal injury settlements or awards resulting from a tort. "[W]e hold that any part of a FELA award representing future losses is not marital property subject to distribution. Rather, only that portion of the award intended as compensation for past losses, that is, losses incurred during the marriage, is included in the marital estate."³² The court explicitly rejected the idea that "an entire lump sum settlement is included in the marital pot."³³

The supreme court, however, did not remand the case to the trial court for further proceedings consistent with its decision. Rather, the majority held that a presumption is created by the dissolution statute that all the assets of either or both parties are subject to division and that

The party who seeks to rebut the presumption, i.e., the party who seeks to have property not included (or at least not divided), bears the burden of demonstrating that the statutory presumption should not apply. This is so because an exclusion from the marital estate directly implicates whether the marital property will be equally divided. And our dissolution statute provides that a party seeking to rebut the presumption of equal division of marital property bears the burden of proof in doing so.³⁴

Thus, the court held that the husband, who sought to exclude the FELA award as

25. *Id.* at 160.

26. *Id.* at 161.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 162.

33. *Id.*

34. *Id.* at 163

property, failed to carry his burden of proof to demonstrate the portion of the award that should not have been included in the marital estate; having failed to carry his burden, the majority could not say that the trial court erred by including the entire award in the marital estate subject to division.³⁵

Justice Dickson concurred with the majority's holding that the portion of the FELA settlement representing future lost earnings should be excluded from the marital pot while the portion intended as compensation for losses incurred during the marriage should be included.³⁶ However, he disagreed "with the majority's decision to create a presumption that all assets of either or both parties in a dissolution case are marital property subject to division."³⁷ Apparently, he was concerned that the presumption was too broad and created the risk of uncertainty as to various types of property outside the marital estate.³⁸ Justice Dickson criticized the majority for deciding against the husband based on an evidentiary presumption "that did not exist at the time the parties presented their evidence and the trial court evaluated it. At the least, the parties and the trial court should be given an opportunity to apply this new presumption to the facts of this case. I believe that remand is appropriate."³⁹

Another case decided during this survey period which determined that an intangible could constitute divisible marriage property is *DeSalle v. Gentry*.⁴⁰ In *DeSalle*, the main portion of the parties' personal property consisted of antique toys which the parties bought and sold at several toy show venues in the eastern continental United States.⁴¹ The wife held fifty-one percent of the stock and the husband held forty-nine percent of the stock in the corporation they formed to buy and sell the toys.⁴² On appeal, the husband complained, among other things, that the trial court erred by awarding the wife profitable toy show venues while he was awarded venues that were either unprofitable or no longer in existence.⁴³ He argued that the venues were personal goodwill, which were excludable from divisible marital property, because only he could represent the business since he is well known in the toy show industry, and he knows all the dealers.⁴⁴ The court disagreed with him. It concluded that the toy show venues were an aspect of the corporation's enterprise goodwill, a different intangible asset, which is divisible marital property.⁴⁵ The disagreement between the court and the husband was not fatal to his claim on appeal, however. The trial court, in attempting to divide the marital estate equally, abused its discretion when it impaired the husband's ability

35. *Id.*

36. *Id.* (Dickson, J., concurring and dissenting).

37. *Id.*

38. *See id.* at 163-64.

39. *Id.* at 165.

40. 818 N.E.2d 40 (Ind. Ct. App. 2004).

41. *Id.* at 43.

42. *Id.*

43. *Id.* at 44.

44. *Id.* at 47.

45. *Id.* at 47-48.

to earn a future income by awarding him the poor performing venues.⁴⁶

The absence of a permanent, physical location for the business means that the toy show venues are the sole place where the toys are bought and sold and, consequently, the sole source of [the husband's] income. . . . [T]he trial court's division of toy show venues effectively resulted in an injunction against [the husband's] future income. Therefore, we hold that the trial court abused its discretion when it divided the toy show venues between the former spouses.⁴⁷

2. *Property Valuation Issues*.—It is a well-established rule of law in Indiana that a trial court may select a valuation date for marital property any time between the date the petition for dissolution is filed and the date a decree of dissolution is entered.⁴⁸ In *Magee*, the court noted that the parties' premarital agreement modified the rule for valuation,⁴⁹ and provided as the valuation date of the wife's interest in a parcel of the husband's real estate the earliest of the parties' estrangement, their legal separation, the dissolution of their marriage, or the husband's death.⁵⁰

The trial court found that the term "estrangement" as used in the premarital agreement was ambiguous and that the parties' testimony regarding its meaning had little value. As a result, the trial court determined that estrangement was not applicable in this case.⁵¹ Obviously, the husband was alive, and the trial court apparently took legal separation literally to mean the filing of a legal separation petition. Accordingly, the trial court selected the date of dissolution as the date to value the wife's interest in the real estate of the husband's that she was to receive under the premarital agreement.⁵² On appeal, the husband contended that the dissolution court erred when it construed the term estrangement and thus used an improper valuation date.⁵³ The court stated that "[a]ntenuptial agreements are legal contracts by which parties entering a marriage attempt to settle their respective interests in the property of the other during the course of the marriage and upon its termination."⁵⁴ They should be "construed according to principals applicable to the construction of contracts generally, and . . . liberally construed to carry out the parties' intent."⁵⁵

In this case, the agreement alters the customary understanding of what is

46. *Id.* at 48.

47. *Id.*

48. *Magee v. Garry-Magee*, 833 N.E.2d 1083, 1087 (Ind. Ct. App. 2005) (citing *Reese v. Reese*, 671 N.E.2d 187, 191 (Ind. Ct. App. 1996)). The date of the filing for dissolution of marriage is the statutory "final separation date." See IND. CODE § 31-9-2-46 (2005).

49. *Magee*, 833 N.E.2d at 1087.

50. *Id.* at 1086.

51. *Id.* at 1088.

52. *Id.* at 1086.

53. *Id.* at 1087.

54. *Id.*

55. *Id.* (internal citation omitted).

included in marital property.⁵⁶ “The Agreement also modifies the rule of law that a trial court may select a valuation date any time between the date a petition for dissolution is filed and the date a decree of dissolution is entered.”⁵⁷

The court went on to state that the trial court’s definition of “estrangement” altered the agreement by improperly adding a condition not in the agreement.⁵⁸ “Both the dissolution court and this court must apply the triggering events clause as it is written even if the draftsmanship is flawed.”⁵⁹ Therefore, “estrangement” must be construed as “a diversion or waning of affections that may or may not be accompanied by a physical separation, regardless of whether legal proceedings have been initiated.”⁶⁰ Here, estrangement had occurred because of the husband’s “verified declaration [of the] irretrievable breakdown of the marriage.”⁶¹

The issue presented in *Goossens v. Goossens*⁶² was whether the trial court erred by using the lower of two amounts testified to by the wife as the value of the marital residence.⁶³ At the final hearing, the wife submitted a verified financial statement which contained her opinion that the value of the marital residence was \$97,500. She also submitted into evidence a tax assessment showing that the assessed value was \$97,500. However, during her direct examination, she testified that she thought the house was worth \$90,000, an amount which her own attorney noted was different from her original estimates. The trial court found that the value of the marital residence was \$90,000, which, obviously, had an affect upon the amount of the equity in the residence.⁶⁴ The husband appealed and claimed that the assignment of value by the trial court was error. The court of appeals did not agree.⁶⁵

Where the trial court’s evaluation of property is within the range of values supported by the evidence, the court does not abuse its discretion. . . . Whether or not we would have come to the same conclusion as the trial court had we been the finder of fact, the fact remains that the trial court’s finding was within the range of values supported by the evidence. We therefore conclude that the trial court did not abuse its discretion in assigning value to the Jackson Boulevard property.⁶⁶

Adjusting the value of a marital asset by debt incurred by one of the parties after the date of filing the petition for dissolution of marriage was rejected in *In*

56. *Id.*

57. *Id.*

58. *Id.* at 1087-88.

59. *Id.* at 1088.

60. *Id.*

61. *Id.* at 1089.

62. 829 N.E.2d 36 (Ind. Ct. App. 2005).

63. *Id.* at 38.

64. *Id.*

65. *Id.*

66. *Id.* at 38-39 (internal citations omitted).

re Marriage of Nickels.⁶⁷ In *Nickels* the husband owned a garage business that apparently was a sole proprietorship. Among the assets comprising the business were a checking account and accounts receivable. However, the trial court's valuation of the accounts was approximately \$3000 lower than what the evidence indicated. On appeal the husband contended that the trial court merely "balanced" the value of the accounts against "'unspecified business debt' and his need to borrow \$3,000 when 'she took everything.'"⁶⁸ The court rejected this argument because "Husband testified that he borrowed the \$3000 *after* he filed the petition for dissolution. . . . Therefore, the trial court's valuation of Husband's 'Garage Account' at \$4487 is not supported by the evidence."⁶⁹

3. *Asset Distribution Issues*.—For the most part, the foregoing cases claim error in the distribution of the marital estate as the result of improper exclusion or inclusion of assets in the estate or the improper valuation of an asset. In *Gard v. Gard*⁷⁰ the trial court attempted to use factors to deviate from the presumption of an equal division of the marital estate⁷¹ because it wanted to adjust the content of the marital estate.⁷² The trial court then applied the percentages for distribution

67. *In re Marriage of Nickels*, 834 N.E.2d 1091, 1100 (Ind. Ct. App. 2005).

68. *Id.* at 1099.

69. *Id.* (emphasis added).

70. 825 N.E.2d 907 (Ind. Ct. App. 2005).

71. IND. CODE § 31-15-7-5 (2005) provides the presumption of an equal division of marital property and a non-exhaustive list of factors to rebut it:

The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:

(1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.

(2) The extent to which the property was acquired by each spouse:

(A) before the marriage; or

(B) through inheritance or gift.

(3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.

(4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.

(5) The earnings or earning ability of the parties as related to:

(A) a final division of property; and

(B) a final determination of the property rights of the parties.

72. In another finding of fact the trial court wrote:

Wife introduced evidence of Husband's net worth at the date of marriage of - \$135,013.14. The Court has already credited Husband with the sum of \$31,400 in pre-marital funds used to establish an investment account, increasing Husband's net worth to -\$103,613.14. Husband testified that an additional \$8,000.00 of alimony to previous

that it found appropriate to the altered marital estate.⁷³ Because of these altered percentages, the husband owed the wife over \$100,000.

The wife obviously recognized that she received sixty-five percent of a reduced marital estate. Both parties filed motions to correct calculation errors.⁷⁴ The husband appealed contending that the trial court should have disregarded his pre-marital debts and the marital assets used to satisfy those debts in determining the marital estate.⁷⁵ Among the husband's arguments was that it appeared that the trial court "without saying so . . . concluded [Husband's] pre-marriage debts had dissipated marital assets."⁷⁶

Although the court in *Gard* did not find any evidence that the trial court had relied upon dissipation, it did find it necessary to recite a concise primer on marital assets and debts for its remand.⁷⁷ It noted that in this case the trial court improperly included the husband's premarital liabilities and assets.⁷⁸ To make clear to the trial court the distinction between the determination of marital property and its distribution, the court of appeals went on to note:

Husband states that he does not challenge the current 60%-40% division of the marital estate, but given that \$95,613.14 must be subtracted from its value, the trial court may determine that a different distribution is more just and reasonable. In this second step of marital property division [i.e. distribution of the assets], the trial court is not prohibited from considering Husband's premarital debts and their satisfaction with marital assets as factors relating to an appropriate division of the marital

wife was not paid; the Court finds that Husband's net worth at the time of the marriage was -\$95,613.14.

Gard, 825 N.E.2d at 909. The court then concluded that the wife was primarily a homemaker and entitled to sixty-five percent of the marital estate and that the husband was entitled to thirty-five percent of the marital estate. *Id.*

73. *Id.*

74. *Id.* The trial court's entry on the wife's motion to correct errors reads in part: [Wife] . . . asserts that the Court erred in deducting from, rather than adding to, the total value of the marital estate, a pre-existing financial obligation of [Husband] which was satisfied during the marital relationship by marital assets. The Court agrees, GRANTS [Wife's] Motion, and adopts the values of the marital estate contained in amended Paragraph 11 of the Court's Findings of Facts. . . . [T]he Court finds that, had those valuation and computational errors not been made, the Court would not have ordered the 65%-35% distribution of the marital estate. The Court further finds and now ORDERS that [Wife] shall receive 60% . . . of the marital estate. Accordingly, the Court now ORDERS [Husband] to pay [Wife] the sum of \$227,372.99 as a final distribution

Id. at 909-10 (alterations in original).

75. *Id.*

76. *Id.* at 911 n.2 (internal quotation marks omitted).

77. *Id.* at 910-11.

78. *Id.*

assets existing at the time of the final separation.⁷⁹

In *Hatten v. Hatten*⁸⁰ the trial court made an unequal distribution of assets favoring the husband in the dissolution of approximately a forty year marriage by awarding him all of a jointly titled investment account because it was traceable to an inheritance the he had received in 1988. The wife appealed this distribution an abuse of discretion.⁸¹

On appeal, the court found that the trial court's findings were not supported by the evidence and did not support the judgment.

The trial court found that the Merrill Lynch account "remained a *separate and distinct* account throughout the marriage," but also found that the parties had "had the *mutual benefit* of approximately \$23,000 of expenditures from the Merrill Lynch account during the marriage." . . . Wife testified that originally, the account was held in Husband's name alone, but at some point, Husband added her name to the account of his own volition. Funds from the account were used to [repair the marital residence] . . . [and] for regular household expenses for both Husband and Wife Under these circumstances, we do not believe that the account can be considered "separate and distinct." Moreover, although it is true, as the trial court found, that Wife did not make any separate financial contribution to the account, the fact that she used a portion of her own inheritance for household expenses and the purchase of a car for Husband in part protected the funds in the Merrill Lynch account from having to be used for those purposes. Finally, the fact that Wife enjoyed the benefit of other commingled funds over the course of the marriage does not disqualify her from also enjoying the benefit of these commingled funds. We therefore hold that the trial court abused its discretion in awarding the entire value of the Merrill Lynch account to Husband.⁸²

Judge Baker dissented and opined that the trial court's findings were sufficient for deviation from the presumption of an equal division.⁸³ The majority responded to Judge Baker's criticism to make clear that its decision was based upon rejection of the mere traceability as a basis for deviation: "We recognize the precedent of *Keller*, but disagree with the conclusion reached therein. People commingle assets for a variety of reasons; however, the mere fact of traceability of assets should not be the basis for deviation from the presumptive equal division. We therefore decline to follow *Keller* herein."⁸⁴

79. *Id.* at 911.

80. 825 N.E.2d 791 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 180 (Ind. 2005).

81. *Id.* at 792-93.

82. *Id.* at 796.

83. *Id.* at 797 (Baker, J., dissenting) (citing *Keller v. Keller*, 639 N.E.2d 372 (Ind. Ct. App. 1994)).

84. *Id.* at 796 (majority opinion).

B. Spousal Maintenance Issues

Two cases decided during the survey period, *Haville v. Haville*⁸⁵ and *Zan v. Zan*⁸⁶ provide answers at this time to the question of whether agreed-to spousal maintenance is subsequently modifiable where the court could have originally ordered the spousal maintenance. That question was specifically left open in the Indiana Supreme Court decision in *Voigt v. Voigt*.⁸⁷

In *Haville*, the parties agreed at the time of their divorce that the husband would pay the wife maintenance in the amount of \$400 per month for the remainder of her life due to the disabling effects of multiple sclerosis.⁸⁸ The agreement to pay life time spousal maintenance was part of the parties' settlement agreement which was approved and incorporated by the court in its decree for dissolution of marriage. Also included in the settlement agreement were provisions providing: (1) that each party released all claims and rights which he or she had against the other by reason of their relationship as the husband and the wife; (2) that each party accepted the provisions of the agreement in full release and settlement of any and all claims that either had against the other; (3) that the settlement agreement was binding upon the heirs, executors and administrators of the parties; and (4) that the agreement settled all property and spousal maintenance rights between the parties.⁸⁹ Five years later the wife petitioned to modify the monthly maintenance seeking an increase. The husband moved to dismiss the petition. The trial court granted the motion to dismiss on the grounds that the agreement was not modifiable because the maintenance payments would continue after the husband's death which the trial court believed it could not have ordered.⁹⁰ The court of appeals affirmed,⁹¹ and the supreme court granted transfer.⁹² A united supreme court voted to affirm the trial court's decision but split 3-2 on the question of whether Indiana law authorizes orders for incapacity maintenance that continue after the obligor's death.⁹³

The majority, led by Justice Dickson, agreed with the wife that a trial court does have the authority to make an incapacity award that continues after the death of the obligor.⁹⁴

85. 825 N.E.2d 375 (Ind. 2005).

86. 820 N.E.2d 1284 (Ind. Ct. App. 2005).

87. 670 N.E.2d 1271, 1280 n.13 (Ind. 1996). What *Voigt* did decide was that a trial court may not grant a contested post-decree modification of agreed-to spousal maintenance if the maintenance was of a form it could not have originally ordered. *Id.* at 1290.

88. *Haville*, 825 N.E.2d at 376.

89. *Id.* at 376-77.

90. *Id.* at 377.

91. *Haville v. Haville*, 787 N.E.2d 410 (Ind. Ct. App. 2003), *superseded by* 825 N.E.2d 375 (Ind. 2005).

92. *Haville*, 825 N.E.2d at 376.

93. *Id.* at 378-79.

94. *Id.* at 377-78.

Indiana case law thus does not prohibit a maintenance obligation from surviving the death of the obligor where the decree so provides. Furthermore, maintenance for a spouse's incapacity, lasting beyond the death of the obligor, is authorized by statute. Where a spouse is incapacitated such that the spouse's ability of self-support is materially affected, a court "may find that maintenance for the spouse is necessary *during the period of incapacity*, subject to further order of the court." The duration of this authorized maintenance obligation is expressly measured by the period of the recipient's incapacity and not by the lifetime of the obligor.⁹⁵

Having found that the trial court could have ordered the spousal maintenance to last beyond the obligor's lifetime, the court, however, found that by the terms of the agreement the spousal maintenance was not modifiable.⁹⁶ Because a trial court cannot order non-modifiable spousal maintenance, "the trial court lacked authority to thereafter modify the maintenance obligation created by the previously approved settlement agreement."⁹⁷

Chief Justice Shepherd, in a concurring opinion, stated his belief that the majority wrongly decided the question whether an Indiana court could order incapacity maintenance beyond the death of the obligor.⁹⁸ Arguing that our legislature abolished the idea of alimony as support for a former spouse, he noted that, prior to its abolition, a trial court could only order alimony for support which terminated upon the death of the spouse, unless the parties agreed otherwise.⁹⁹ Thus, in his opinion, the legislature did not intend to authorize judges to order maintenance beyond the death of the obligor. Rather, the legislature intended to recognize that certain impairments may last for quite a long time.¹⁰⁰

Barring a subsequent supreme court decision to the contrary, the court in *Zan v. Zan* did squarely address the issue left open by *Voigt*.¹⁰¹ In *Zan*, the husband agreed to pay \$800 a month to the wife in rehabilitative maintenance for a period of three years, so long as he remained employed in his current capacity. The parties specifically agreed that, should his employment change, then that event would be considered a substantial change in circumstances for purposes of modification of the amount of maintenance payable to the wife.¹⁰² The wife used the spousal maintenance payments to live off of and made minimal efforts to obtain education which, according to the parties' agreement, was the object of the rehabilitative spousal maintenance so that she could improve her employment

95. *Id.* (internal citation omitted).

96. *Id.* at 378.

97. *Id.* (citing *Voigt v. Voigt*, 670 N.E.2d 1271, 1280 (Ind. 1996)).

98. *Id.* at 379 (Shepard, C.J., concurring).

99. *Id.* at 379-80.

100. *Id.*

101. *Zan v. Zan*, 820 N.E.2d 1284, 1286 (Ind. Ct. App. 2005).

102. *Id.*

opportunities.¹⁰³ The husband apparently got tired of this and filed his petition to modify or revoke the spousal maintenance. The trial court modified the agreement by providing that the former husband would not have to pay any further maintenance to the wife unless she enrolled in an education program by a date certain and successfully completed it.¹⁰⁴ On appeal, the wife contended that the trial court erred in modifying the agreement because it lacked the authority to originally order the husband to make the spousal maintenance payments. The husband then argued on appeal that the court did have the authority to order him to make rehabilitative maintenance payments.¹⁰⁵ The court agreed with the husband and found that the trial court clearly had the authority, pursuant to Indiana Code section 31-15-7-2(3),¹⁰⁶ to order the husband to make rehabilitative maintenance payments without the agreement of the parties.¹⁰⁷ This was the question left unanswered in *Voigt*.

In *Voigt*, our supreme court established a general principal: “[w]here a court had no authority to impose the kind of maintenance award that the parties forged in a settlement agreement, the court cannot subsequently modify the maintenance obligation without the consent of the parties.” The court reserved the question whether a court may modify a maintenance obligation that originated in a settlement agreement but that rested on one of the grounds—including rehabilitative maintenance—on which the court could have ordered the same maintenance in the absence of agreement.

...

Although our supreme court has not squarely decided the issue presented

103. *Id.*

104. *Id.* at 1286-87.

105. *Id.* at 1287.

106. IND. CODE § 31-15-7-2(3) (2005).

After considering:

- (A) the educational level of each spouse at the time of marriage and at the time the action is commenced;
 - (B) whether an interruption in the education, training, or employment of a spouse who is seeking maintenance occurred during the marriage as a result of homemaking or child care responsibilities, or both;
 - (C) the earning capacity of each spouse, including educational background, training, employment skills, work experience, and length of presence in or absence from the job market; and
 - (D) the time and expense necessary to acquire sufficient education or training to enable the spouse who is seeking maintenance to find appropriate employment;
- a court may find that rehabilitative maintenance for the spouse seeking maintenance is necessary in an amount and for a period of time that the court considers appropriate, but not to exceed three (3) years from the date of the final decree.

Id.

107. *Zan*, 820 N.E.2d at 1288.

today, it is our view that the trial court may modify the Agreement under these circumstances. To hold otherwise may circumvent the parties' ability or desire to bargain independently without court intervention. Put another way, a party may be loathe to enter into an agreement such as the one here, knowing that a court could not intervene in the event of changed circumstances.¹⁰⁸

The countervailing view was expressed by Chief Judge Kirsch in a dissenting opinion. In short, he would prohibit the modification of any maintenance provision in a negotiated property settlement agreement—whether the trial court could have awarded the maintenance or not.¹⁰⁹

Negotiated maintenance provisions are only one part of a negotiated property agreement. In exchange for such provisions, a party may give up other property claims or may agree to such a provision solely because of tax consequences of such a provision. Thus, modifying a negotiated maintenance provision implicates the entire division of the marital estate. Moreover, modifying the provision in effect adds a term to the parties' contract for which they did not bargain and for which they neither gave, nor received, consideration. Here, the parties could have made maintenance conditional on wife's satisfactory educational progress. They did not.¹¹⁰

C. Miscellaneous Issues

1. *Jurisdiction to Enforce Divorce Decree.*—In *Fackler v. Powell*,¹¹¹ the former spouses disputed the amount of money that the former husband was to pay to the wife under a certain promissory note related to a construction project which the wife was awarded in the parties' settlement agreement.¹¹² The wife sought to have the dispute adjudicated in a court other than the one that issued the dissolution decree. The trial court held that it had subject matter jurisdiction over the dispute.¹¹³ The husband appealed, the court of appeals affirmed, and the husband sought, and the supreme granted, transfer.¹¹⁴

The supreme court started its analysis,

with the firmly established rule that a court that issues a dissolution decree retains exclusive and continuing responsibility for any future modifications and related matters concerning the care, custody, control, and support of any minor children. Among the policy reasons supporting

108. *Id.*

109. *Id.* at 1290 (Kirsch, J., dissenting).

110. *Id.*

111. 816 N.E.2d 476 (Ind. Ct. App. 2004), *superseded by* 839 N.E.2d 165 (Ind. 2005).

112. *Id.* at 478-79.

113. *Id.* at 481.

114. *Fackler v. Powell*, 839 N.E.2d 165 (Ind. 2005).

this rule is that deciding these matters frequently “involve factual determination[s] that substantial and continuing, changed circumstances render the existing terms unreasonable”; an inquiry that the dissolution court is in the best position to conduct.¹¹⁵

Recognizing that the case before it did not involve child-related issues, the court went on to hold: “But even under these circumstances, we believe the interests of judicial efficiency and comity are best served by requiring litigants to seek clarification and enforcement of property settlement agreements in the dissolution court. Both precedent and broader policy considerations support this result.”¹¹⁶

Justice Boehm dissented in a separate opinion in which Justice Dickson concurred.¹¹⁷ Viewing the former wife’s claim as nothing more than a suit to collect on a promissory note that was assigned to her in a divorce proceeding, it was his opinion that she was free to seek enforcement in any court of competent jurisdiction.¹¹⁸

2. *Attorney’s Fees for Bad Faith Litigation.*—*French v. French*¹¹⁹ and *Gaw v. Gaw*¹²⁰ presented, among other issues, requests for attorney’s fees under the statute permitting an award of attorney’s fees in civil actions for frivolous, unreasonable, or groundless claims or defenses.¹²¹

In *French*, the trial court awarded the former husband \$500 in attorney’s fees against the wife in a post-decree contempt action.¹²² In the original dissolution decree, the trial court had ordered the husband to assume certain attorney’s fees for a civil case litigated by the parties during the marriage without a determination of the amount owed. A year later, the wife, who was represented by the attorney to whom the parties owed the fees for the civil action, brought a contempt action against the husband for failure to pay the fees. In response to the contempt action the trial court found that the husband was not in contempt because the amount to pay was not and could not be determined by it. Nevertheless, the wife once again filed another petition for contempt for failure

115. *Id.* at 167 (internal citations omitted).

116. *Id.*

117. *Id.* at 170 (Boehm, J., dissenting).

118. *Id.*

119. 821 N.E.2d 891 (Ind. Ct. App.), *reh’g denied* (Ind. Ct. App. 2005).

120. 822 N.E.2d 188 (Ind. Ct. App. 2005).

121. IND. CODE § 34-52-1-1(b) (2005) provides:

In any civil action, the court may award attorney’s fees as part of the cost to the prevailing party, if the court finds that either party:

- (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
- (2) continued to litigate the action or defense after the party’s claim or defense clearly became frivolous, unreasonable, or groundless; or,
- (3) litigated the action in bad faith.

122. *French*, 821 N.E.2d at 898.

to pay the same fees.¹²³ Again the trial court rejected the petition for contempt and ordered the wife to pay the husband \$500 “for having to defend [the wife’s] baseless Petition for Contempt.”¹²⁴ The wife appealed. The court reviewed its prior decision defining the terms of the frivolous litigation statute. It noted that in a previous decision it had

defined a claim or defense as frivolous (a) if it is taken primarily for the purpose of harassing or maliciously injuring a person, or (b) if the lawyer is unable to make a good faith and rational argument on the merits of the action, or (c) if the lawyer is unable to support the action taken by a good faith and rational argument for an extension, modification, or reversal of existing law. A claim or defense is unreasonable under the statute, if, based on a totality of the circumstances, including the law and the facts known at the time of the filing, no reasonable attorney would consider that the claim or defense was worthy of justification. Finally, we determined a claim or defense to be groundless if no facts exist which support the legal claim relied on and presented by the losing party. Furthermore, we held that a claim or defense is neither groundless nor frivolous merely because a party loses on the merits.¹²⁵

Finding that both of the trial court’s decisions on the former wife’s petitions for contempt were clear and well reasoned, the court concluded that her brief on appeal left them with a clear conviction that the trial court did not err.¹²⁶

Even though her argument may be novel, the absolute lack of any supporting Indiana or out-of-state case law and the absence of a good faith argument after the trial court’s repeated and consistent analyses, makes us hesitant to categorize [the wife’s] actions as zealous advocacy. Rather, we conclude that with her continuous filings [the wife] crossed the boundary into unnecessary and unwarranted litigation.¹²⁷

In *Gaw v. Gaw* the wife filed a motion to join a third party creditor as a defendant in her dissolution proceeding because of her frustration over the application of her and her husband’s payments on several loan accounts with the creditor.¹²⁸ The trial court issued an order joining the creditor as a party without holding a hearing on the matter.¹²⁹ The creditor responded by filing motions to dismiss, for summary judgment, to correct error and to reconsider, along with a motion requesting attorney’s fees under Indiana Code section 34-52-1-1.¹³⁰ The trial court conducted a hearing on the motions and dismissed the third party

123. *Id.*

124. *Id.*

125. *Id.* at 897 (internal citations omitted).

126. *Id.* at 898.

127. *Id.* (internal citation omitted).

128. *Gaw v. Gaw*, 822 N.E.2d 188, 189-90 (Ind. Ct. App. 2005).

129. *Id.* at 190.

130. *Id.*

creditor but declined to find that the joinder had been wrongful and, thus, denied the creditor's petition for attorney's fees. On appeal, the creditor first argued that the trial court abused its discretion when it joined it as a party to the dissolution proceedings. The appellate court found the issue moot.¹³¹ "However, we would be remiss if we failed to address the impropriety of joining a third-party creditor to a dissolution proceeding."¹³² Noting that the wife neither filed a claim against the creditor nor established that joinder was mandatory or permissive, the court observed: "Neither the rules of trial procedure nor the dissolution of marriage statutes are so broad as to require third parties to be dragged into marriage dissolution proceedings by their heels and there compelled to litigate issues that are but tangential to that cause of action."¹³³

The court rejected the wife's argument that *In re Marriage of Dall*¹³⁴ made creditors a proper party to join.¹³⁵

However, the holding in *Dall* speaks only to the propriety of joining a nonparty to a divorce proceeding when a party claims that the marital estate includes an equitable interest in real property titled in that nonparty. The holding in *Dall* does not support the joinder of a third-party creditor like Sterling to a dissolution proceeding. Finally, we also note that the trial court granted [the wife's] motion to join Sterling two days after it was filed, without a hearing, and likely before Sterling had even received its notice by mail. Under these facts and circumstances, the trial court abused its discretion when it joined Sterling as a party to the Gaws' dissolution proceeding.¹³⁶

Turning to the creditor's claim that it was an abuse of discretion to deny its petition for attorney's fees, the court concluded that the wife's argument to join Sterling was not completely unsupportable.¹³⁷

In addition, Sterling argues that [the wife] filed the motion to join in bad faith for the purpose of harassment. Bad faith "implies the conscious doing of a wrong because of dishonest purpose or moral obliquity." Sterling points to no evidence indicating that [the wife's] motion to join was motivated by any dishonest purpose. [The wife] and her attorney were clearly frustrated by Sterling's heavy-handed attitude. Although, [the wife's] joinder of Sterling borders on being unreasonable and groundless, we cannot conclude that the trial court abused its discretion

131. *Id.*

132. *Id.*

133. *Id.* at 191 (quoting *State ex rel. Stanton v. Super. Ct. Lake County*, 355 N.E.2d 406, 407-08 (Ind. 1976)).

134. 681 N.E.2d 718 (Ind. Ct. App. 1997).

135. *Gaw*, 822 N.E.2d at 191.

136. *Id.* at 192 (internal citation omitted).

137. *Id.*

when it denied Sterling attorney's fees.¹³⁸

4. *Relief from Judgment for Fraud Not Supported by Opinion of Value.*—In *Wheatcraft v. Wheatcraft*¹³⁹ the wife filed a motion to set aside a mediated settlement agreement that had been approved by the court over wife's objection.¹⁴⁰ At the hearing on the motion to set aside, the wife claimed that the husband had committed fraud to induce her to sign the settlement agreement and that she had signed the agreement under duress. The wife testified that she feared the husband might hurt her if she did not sign the agreement based solely on his insistence that the parties successfully conclude mediation that day and her feeling that she was "beaten down" by the husband.¹⁴¹ The wife's fraud claim was based on the husband's opinion of the value of his business at mediation. At the mediation, the husband opined that the business was worth approximately \$43,000 based on what he had been told by an appraiser. According to the wife, her first attorney had done nothing to value the business. The trial court found that the wife's claims were baseless.¹⁴²

On appeal, the wife alleged that the husband committed actual fraud or, alternatively, constructive fraud when he represented the value of the company. The court of appeals did not agree.¹⁴³

The elements of actual fraud which a plaintiff must prove are: (1) a material misrepresentation of a past or existing fact which (2) was untrue, (3) was made with knowledge of or in reckless ignorance of its falsity, (4) was made with the intent to deceive, (5) was rightfully relied upon by the complaining party, and (6) which proximately cause the injury or damage complained of. The elements of constructive fraud are: (1) a duty owing by the party to be charged to the complaining party due to their relationship, (2) violation of that duty by the making of deceptive material misrepresentations of past or existing facts or remaining silent when a duty to speak exists, (3) reliance thereon by the complaining party, (4) injury to the complaining party as a proximate result thereof, and (5) the gaining of an advantage by the party to be charged at the expense of the complaining party.¹⁴⁴

Noting that it is well settled that fraud requires a misrepresentation of a material fact, the court held:

Expressions of opinions cannot be the basis for an action in fraud. "[T]he general rule is that statements of value are regarded as mere expressions of opinion." More specifically, this court has held that an appraisal is a

138. *Id.* at 192-93 (citations omitted).

139. 825 N.E.2d 23 (Ind. Ct. App. 2005).

140. *Id.* at 27.

141. *Id.* at 28.

142. *Id.* at 29-30.

143. *Id.* at 31.

144. *Id.* at 30 (internal citation omitted).

matter of opinion, and is not, therefore, actionable under a theory of fraud. Accordingly, we hold that in this case, Wife cannot show actionable fraud based upon Husband's representation regarding the company's valuation.¹⁴⁵

5. *Family Law Arbitration*.—Effective July 1, 2005, Indiana Code chapter 34-57-5 provides for family law arbitration.¹⁴⁶ Indiana Code section 34-56-5-2 permits parties to agree in writing to submit to arbitration by a family law arbitrator actions for dissolution of marriage, to establish child support, custody or parenting time or to modify a decree, judgment or order entered under Title 31.¹⁴⁷ Unless the parties agree in writing to repudiate the agreement to submit to

145. *Id.* at 30-31 (internal citations omitted).

146. IND. CODE §§ 34-57-5-1 to -5-13 (2005).

147. IND. CODE § 34-57-5-2 (2005) provides:

(a) In an action:

(1) for the dissolution of a marriage;

(2) to establish:

(A) child support;

(B) custody; or

(C) parenting time; or

(3) to modify:

(A) a decree;

(B) a judgment; or

(C) an order;

entered under IC 31;

both parties may agree in writing to submit to arbitration by a family law arbitrator.

(b) If the parties file an agreement with a court to submit to arbitration, the parties shall:

(1) identify an individual to serve as a family law arbitrator; or

(2) indicate to the court that they have not selected a family law arbitrator.

(c) Each court shall maintain a list of attorneys who are:

(1) qualified; and

(2) willing to be appointed by the court;

to serve as family law arbitrators.

(d) If the parties indicate that they have not selected a family law arbitrator under subsection (b)(2), the court shall designate three (3) attorneys from the court's list of attorneys under subsection (c). The party initiating the action shall strike one (1) attorney, the other party shall strike one (1) attorney, and the remaining attorney is the family law arbitrator for the parties.

(e) In a dissolution of marriage case, the written agreement to submit to arbitration must state that both parties confer jurisdiction on the family law arbitrator to dissolve the marriage and to determine:

(1) child support, if there is a child of both parties to the marriage;

(2) custody, if there is a child of both parties to the marriage;

(3) parenting time, if there is a child of both parties to the marriage; or

(4) any other matter over which a trial court would have jurisdiction concerning

arbitration by a family law arbitrator, it is irrevocable and enforceable.¹⁴⁸ If there is a child of both parties, the arbitrator is mandated to comply with the Indiana Child Support and Parenting Time Guidelines.¹⁴⁹ The arbitrator must take an oath prior to arbitration.¹⁵⁰ The arbitrator must divide marital property in accordance to the dissolution statute¹⁵¹ and make written findings within thirty days after the hearing unless both parties consent to an extension of up to ninety days.¹⁵² If requested, the arbitrator must make a record of the hearing.¹⁵³ Importantly, the chapter on arbitration does not apply if one party is represented by an attorney and the other party is pro se.¹⁵⁴ The definition of a family law arbitrator includes attorneys certified as family law specialists, qualified private judges, former commissioners and magistrates of Indiana courts of record, and attorneys registered as domestic mediators.¹⁵⁵

II. CHILD CUSTODY AND PARENTING TIME

A. *Determination of Custody*

1. *Religious Considerations.*—The parents' religion was the issue in the case of *Jones v. Jones*.¹⁵⁶ Both the mother and father practiced Wicca, a form of paganism.¹⁵⁷ Both parents sought custody of their minor child. A custody evaluation was performed and filed with the court. At the final hearing, after reviewing the custody evaluation, the court extensively questioned both parents regarding their practice of Wicca and their pagan beliefs. In its decree of dissolution the court granted joint custody to the parents with the father being the child's physical custodial parent.¹⁵⁸

family law.

148. *Id.* § 34-57-5-3.

149. *Id.* § 34-57-5-5.

150. *Id.*

151. *Id.* § 34-57-5-8.

152. *Id.* § 34-57-5-7.

153. *Id.* § 34-57-5-6.

154. *Id.* § 34-57-5-1.

155. *Id.* § 34-6-2-44.7.

156. 832 N.E.2d 1057 (Ind. Ct. App. 2005).

157. *Id.* at 1058.

158. *Id.* at 1059. IND. CODE § 31-17-2-17 (2005) provides as follows:

(a) Except:

(1) as otherwise agreed by the parties in writing at the time of the custody order;
and

(2) as provided in subsection (b);

the custodian may determine the child's upbringing, including the child's education, health care, and religious training.

(b) If the court finds after motion by a non-custodial parent that, in the absence of specific limitation of the custodian's authority, the child's:

However, the court placed a limitation in its order respecting custody prohibiting either parent from practicing their Wicca faith around the child or involving the child in Wicca or pagan practices.¹⁵⁹ The father filed a motion to correct error, in which the mother joined, asking that the restriction on religious upbringing be struck from the decree. The trial court denied the motion and father appealed.

On appeal, the court granted the father's request that the religious restriction be removed but affirmed the decree in all other respects.¹⁶⁰ The court found that Indiana Code section 31-17-2-17 "expressly reserves for the custodial parent the authority to determine the child's upbringing, unless otherwise agreed by the parties in writing at the time of the custody hearing."¹⁶¹ The court also observed that the trial court, under the statute, could only place limits on the custodial parent's authority if the court found that the child's "physical health would be endangered" or that the child's "emotional health would be significantly impaired."¹⁶² For the trial court to limit the custodial parent's authority in this regard, the court must make specific findings that the child would be endangered absent the restriction.¹⁶³ The court did not make any specific finding regarding endangerment to the child and the religious restriction was removed.¹⁶⁴

The case of *Pawlik v. Pawlik*¹⁶⁵ addressed the rather unique question of whether it is proper, in a custody determination, to cross examine a non-party witness about her religious beliefs. On appeal the father questioned the trial Court's award of custody to the mother.¹⁶⁶ The father contended that it was error for the trial court to allow cross examination of the father's mother regarding her religious beliefs in violation of Indiana Evidence Rule 610.¹⁶⁷ The paternal grandmother was a devout Jehovah's Witness and counsel for the mother cross-examined her extensively regarding her beliefs. The evidence showed that the grandmother had been and would continue to be involved as a care giver of the child if the father were awarded custody.

In affirming the trial court, the court of appeals observed that the questions pertaining to the grandmother's religious beliefs were not intended to impeach

(1) physical health would be endangered; or

(2) emotional health would be significantly impaired;

the court may specifically limit the custodian's authority.

159. *Jones*, 832 N.E.2d at 1059.

160. *Id.* at 1061.

161. *Id.* at 1060.

162. *Id.* (quoting IND. CODE § 31-17-2-17).

163. *Id.* The court relied upon *Clark v. Madden*, 725 N.E.2d 100, 105 (Ind. Ct. App. 2000), in making this holding.

164. *Id.* at 1061.

165. 823 N.E.2d 328 (Ind. Ct. App. 2005).

166. *Id.* at 329.

167. *Id.* at 330. Indiana Evidence Rule 610 states that "[e]vidence of the beliefs or opinions of a witness on matters of religions is not admissible for the purposes of showing that, by the reason of their nature, the witness's credibility is impaired or enhanced." IND. R. EVID. 610.

her credibility.¹⁶⁸ Instead it was sought to determine the extent that the grandmother would influence the child's religious training in the event that the father was awarded physical custody.¹⁶⁹ Because Indiana Code section 31-17-2-17 allows the custodial parent to determine the child's religious training, an inquiry into those people who have an influence on that training is appropriate.¹⁷⁰

The court of appeals was careful to say that the trial court cannot make a determination based upon an assessment of which party's religious beliefs are preferable but did note that there were legitimate reasons for the court to consider such evidence.¹⁷¹ The appellate court was satisfied that the questioning of the grandmother about her religious beliefs did not violate Rule 610.¹⁷²

2. *Custody Standard*.—The case of *Hughes v. Rogusta*¹⁷³ asked the court of appeals to address the issue of which custody standard should be used when unmarried cohabitating parents end their cohabitation and both seek custody of their child.¹⁷⁴ The mother and father lived together and during the time they lived together they had a child. The parties executed a paternity affidavit at the hospital following the child's birth. They continued to live together until the child was four years old at which time mother moved out of the residence and left the child with the father. The father filed a petition to establish paternity and sought custody. After a hearing the court granted the father's petition and placed custody of the child with the father. The mother appealed.¹⁷⁵

The significant issue raised by mother on appeal is whether the trial court should have used the custody modification standard instead of the initial custody determination standard.¹⁷⁶ The initial custody determination is provided for in Indiana Code section 31-14-13-2¹⁷⁷ and a subsequent modification of child

168. *Id.* at 333.

169. *Id.*

170. *Id.*; IND. CODE § 31-17-2-17 (2004).

171. *Pawlik*, 823 N.E.2d at 333.

For instance, the court is empowered to order the noncustodial parent to refrain from allowing the child to participate in activities that are inconsistent with the custodial parent's religious beliefs. The court might also need to know of the custodial parent's religious beliefs in fashioning its visitation schedule. The court might also need information about the parties' religious beliefs for purposes of determining the noncustodial parent's duties under the decree of dissolution.

Id. (internal citations omitted).

172. *Id.* at 334.

173. 830 N.E.2d 898 (Ind. Ct. App. 2005).

174. *Id.* at 900.

175. *Id.*

176. As the court of appeals noted, "[t]he difference is important. In an initial custody determination, both parents are presumed equally entitled to custody, but a petitioner seeking subsequent modification bears the burden of demonstrating that the existing custody should be altered." *Id.* (citing *Apter v. Ross* 781 N.E.2d 744, 758 (Ind. Ct. App. 2003)).

177. IND. CODE § 31-14-13-2 (2005) provides:

The court shall determine custody in accordance with the best interests of the child. In

custody in a paternity action is governed by Indiana Code section 31-14-13-6.¹⁷⁸ The mother's position was that the use of the initial custody standard by the trial court was error because the father had executed the paternity affidavit when the child was born. Paternity affidavits are governed by Indiana Code section 16-37-2-2.1(g) which in relevant part provides that "if a paternity affidavit is executed under this section, the child's mother has sole legal custody unless another custody determination is made by a court in a proceeding under IC 31-14."¹⁷⁹

The mother argued in support of her claimed error that the case was governed by *In re Paternity of Winkler*.¹⁸⁰ The court, however, distinguished *Winkler* by pointing out that in *Winkler*—after the parties separated—the father had acquiesced in the mother's custody of the child for ten years.¹⁸¹ Accordingly, it was appropriate to apply the custody modification standard.¹⁸²

In *Hughes*, the court rejected the mother's argument by pointing out that there had been no prior court determination of custody, the parties had lived together with the child until the child was four years old, and most importantly, the father did not acquiesce in the custody of the child with the mother after the parties separated.¹⁸³

determining the child's best interests, there is not a presumption favoring either parent. The court shall consider all relevant factors including the following:

- (1) The age and sex of the child,
- (2) The wishes of the child's parents.
- (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
- (4) The interaction and interrelationship of the child with:
 - (A) the child's parents;
 - (B) the child's siblings; and
 - (C) any other person who may significantly affect the child's best interest.
- (5) The child's adjustment to home, school, and community.
- (6) The mental and physical health of all individuals involved.
- (7) Evidence of a pattern of domestic or family violence by either parent.
- (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 2.5(b) of this chapter.

178. IND. CODE § 31-14-13-6 provides: "[T]he court may not modify a child custody order unless: (1) modification is in the best interests of the child; and (2) there is substantial change in one (1) or more of the factors that the court may consider under section 2 and, if applicable, section 2.5 of this chapter."

179. *Hughes*, 830 N.E.2d at 901.

180. 725 N.E.2d 124 (Ind. Ct. App. 2000).

181. *Hughes*, 830 N.E.2d at 901.

182. *Id.*

183. *Id.* at 901-02. Also, the signing of the paternity affidavit did not amount to a prior court determination. *Id.*

B. Modification of Custody

1. *Child's Wishes*.—Modification of a child custody order in Indiana is restricted by Indiana Code section 31-17-2-21(a) which provides, in relevant part, that “[t]he court may not modify a child custody order unless: (1) the modification is in the best interests of the child; and, (2) there is a substantial change in one (1) or more of the factors the court may consider under [Indiana Code section 31-17-2-8].”¹⁸⁴ Indiana Code section 31-17-2-8(3) provides that the court may consider “[t]he wishes of the child with more consideration given to the child’s wishes if the child is at least fourteen (14) years of age.”¹⁸⁵ In the case of *Williamson v. Williamson*,¹⁸⁶ the court was called upon to decide the weight given to the wishes of the child at age seventeen versus the child at thirteen.¹⁸⁷

The child¹⁸⁸ was in the custody of the father and mother filed a petition to modify custody. A previous custody determination had been made when the child was thirteen years of age. In the years following the prior modification, the father’s relationship with the child worsened to the point that there was almost no emotional bond between the child and his father, they interacted on a very limited basis, and there was significant conflict between the two. After a hearing, the trial court determined that the child had “a strong desire to reside with his mother” and that it would be in the child’s best interest to modify custody to the mother.¹⁸⁹ The court granted the mother’s petition to modify custody and the father appealed.

On appeal the father argued, among other things, that the child wished to live with his mother at the time of the last modification when the child was thirteen and that he still wished to live with his mother, thus, there had been no substantial change in the child’s wishes and no substantial change in circumstances.¹⁹⁰ In the rejecting this argument, the court of appeals said:

[The child] would have been 13 years old at the time of the last modification. Consequently, the trial court would not have been required to consider [the child’s] wishes at the last modification but was required to consider [the child’s] wishes during this modification. As a result, the trial court properly placed more consideration on [the child’s] wishes at the time of this modification request than on his wishes at the prior modification.¹⁹¹

The father had also argued that the long standing rule in Indiana is that “a

184. IND. CODE § 31-17-2-21(a) (2005).

185. *Id.* § 31-17-2-8(3).

186. 825 N.E.2d 33 (Ind. Ct. App. 2005).

187. *Id.* at 40.

188. At the time of the petition which is the subject of the present case, the child was seventeen. *Id.*

189. *Id.* at 37.

190. *Id.* at 40.

191. *Id.*

change in the child's wishes, standing alone, cannot support a change in custody."¹⁹² The court agreed with the father that this is the longstanding rule in Indiana but the court concluded that the trial court properly relied on another factor listed in Indiana Code section 31-17-2-8.¹⁹³ The decision of the trial court was affirmed.¹⁹⁴

2. *Tape Recording Child's Telephone Calls*.—The 2003 case of *Apter v. Ross*¹⁹⁵ held that a parent can record the telephone conversation of his minor child if the recording is motivated by a genuine concern for the child's welfare.¹⁹⁶ If the recording was done as a means to interfere with the other parent's relationship with the child and not for the child's well being, then the court could consider this as a factor in modifying custody.

In the current survey period, the court of appeals, reaffirmed its prior ruling in *Apter* in the case of *Leisure v. Wheeler*.¹⁹⁷ The father had primary physical custody of the children from the parties' marriage which had ended in divorce in May 1998.¹⁹⁸ In August 2004, the mother sought modification of custody alleging that the father was abusive towards their child, the child suffered physically from this abuse, and the child was afraid of the father.¹⁹⁹ After a hearing, the trial court denied the mother's petition to modify custody and the mother appealed.

On appeal, the mother alleged that there was a substantial change in at least three of the statutory factors delineated at Indiana Code section 31-17-2-8.²⁰⁰ She contended, among other things, that the father had interfered with her interaction and interrelationship with the child by taping telephone conversations between the mother and the child. The Indiana Parenting Time Guidelines provide guidance for communications between a child and his or her parents, both generally and by telephone.²⁰¹ In *Apter*, the court held: "A parent's concern for a child's well-being must be the purpose in taping the phone conversation . . . [It] is a parent's motivation and not the child's actual well being that is important in

192. *Id.* (citing *Joe v. LeBow*, 670 N.E.2d 9, 25 (Ind. Ct. App. 1996)).

193. *Id.*

194. *Id.*

195. 781 N.E.2d 744 (Ind. Ct. App. 2003).

196. *Id.* at 754.

197. 828 N.E.2d 409 (Ind. Ct. App. 2005).

198. *Id.* at 412.

199. *Id.* Interestingly, the parties' other child had died earlier in 2004 by means of accidental drowning while in the mother's care. *Id.*

200. *Id.* at 414.

201. Indiana Parenting Time Guidelines § I(A)(2)-(3) provides, in part: "[a] child and a parent shall be entitled to private communications without interference from the other parent . . . [b]oth parents shall have reasonable phone access to their child at all times . . . without interference from the other parent." The commentary to section I(A) states: "[e]xamples of unacceptable interference with the communication include . . . a parent recording phone conversations between the other parent and the child"

determining this issue.”²⁰² *Apter* also held that, unless restricted in some legal proceedings, a parent has the power to consent on the behalf of his or her minor child to the recording of that child’s phone conversation.²⁰³

In *Leisure* the court determined that

a parent can consent on behalf of his minor child to the recording of a telephone conversation where the recording is motivated by a genuine concern for the welfare of a child. However, the trial court, if it finds that the recording was not done for the well-being of the child but instead as a way to interfere with the other parent’s relationship with the child, may consider this as a factor in modifying custody. As the Parenting Time Guidelines indicate, children should generally be able to engage in telephone conversations with a parent without the other parent recording those conversations.²⁰⁴

Because the father convinced the trial court that he was motivated by a genuine concern for his child, the trial court did not commit error by deciding that the father’s taping of the telephone conversation did not establish a substantial change necessitating the modification of custody.²⁰⁵

3. *Role of Guardian Ad Litem*.—The question of whether a guardian ad litem (“GAL”), appointed prior to the final decree of dissolution has less authority in post decree matters was addressed by the court in *Carrasco v. Grubb*.²⁰⁶ The mother had petitioned for dissolution of marriage and requested appointment of a guardian ad litem, which was granted. The GAL’s services were to “include, but [were] not exclusive of researching, examining, advocating, facilitating and monitoring the children’s situation.”²⁰⁷ The GAL conducted an investigation of the minor children’s circumstances and filed a report with the court. The parents then entered into an agreement settling the dissolution matters and the trial court entered a final decree granting the mother sole physical custody of both children. Subsequently, the mother began to experience severe difficulties with one of the children and believed that her ex-husband was encouraging this behavior. She contacted the GAL for assistance but eventually came to believe that the GAL’s involvement was “intrusive rather than helpful.”²⁰⁸

The GAL filed a report recommending that the father have sole legal and physical custody of the difficult child and that the other child remain with the mother. The GAL filed a motion with the court which was treated as the GAL’s petition to modify the custody order. At a pre-trial conference a temporary agreement was struck whereby the difficult child was placed with the father and

202. *Apter v. Ross*, 781 N.E.2d 744, 754 (Ind. Ct. App. 2003) (citing *Schieb v. Grant*, 22 F.3d 149, 154-55 (7th Cir. 1994)).

203. *Id.* at 756.

204. *Leisure*, 828 N.E.2d at 415-16.

205. *Id.* at 416.

206. 824 N.E.2d 705 (Ind. Ct. App. 2005).

207. *Id.* at 708 (alteration in original).

208. *Id.*

the other child remained with the mother.²⁰⁹ The court then entered an order placing the difficult child with the father and also set forth a parenting time schedule and sanctions should the parties not comply with the trial court's directive.

About a month later, the mother became dissatisfied with the arrangement and sought to withdraw her consent to the temporary custody arrangement. She filed a motion to strike the GAL's report as "unauthorized and inappropriate under the relevant Indiana statutes."²¹⁰ Her request was denied by the court and thereafter the trial court entered an order making permanent the change of custody of the difficult child to the father.²¹¹ The trial court concluded that the GAL had acted within her statutory authority at all times. The mother appealed.

On appeal, the mother argued that the custody order must be set aside because the GAL's actions in the post dissolution proceedings were unauthorized by statute or case law and amounted to an "unlawful attempt to relitigate the original custody decree."²¹² In rejecting this contention the court stated:

[W]e note that Indiana Code section 31-15-6-4 provides that a GAL is required to serve until he or she is excused by the trial court. Additionally, Indiana Code section 31-15-6-1 provides that in a dissolution action, a GAL may be appointed by the court "at any time." And the trial court may order a GAL to "exercise continuing supervision over the child to assure that the custodial or visitation terms of an order entered by the court . . . are carried out as required by the court." Once the GAL is appointed, his or her role as defined in Indiana Code section 31-15-6-3 is to represent and protect the best interest of a child and to provide the child with services requested by the court, including "researching, examining, advocating, facilitating and monitoring the child's situation."²¹³

Accordingly, the court concluded that a GAL does not have less authority in post decree matters and the "GAL's responsibilities are not dependent upon the stage of the proceedings."²¹⁴ The mother's argument that the GAL's actions were an attempt to relitigate the custody award were also rejected.²¹⁵ The court observed that the trial court had continuing jurisdiction over custody matters pursuant to Indiana Code section 31-17-2-8 and parenting time matters pursuant to Indiana Code section 31-17-4-2.²¹⁶

4. Parenting Time and Attorney's Fees.—The issue of a trial court's order restricting a father's parenting time and order of attorney's fees to the mother was

209. *Id.*

210. *Id.* at 709.

211. *Id.* The other child remained with the mother.

212. *Id.*

213. *Id.* (internal citations omitted).

214. *Id.* at 710.

215. *Id.*

216. *Id.*

addressed in the case of *Barger v. Pate*.²¹⁷ The parties were divorced and they had agreed that they would share joint legal custody and that the mother would have physical custody of their two children.²¹⁸ Later, after the first child had been admitted to a juvenile facility for physically accosting his mother, the father filed a petition for custody of this child, in which the mother joined. The mother also petitioned for the father's termination of joint legal custody of the second child, and, in return, the father petitioned for physical custody of the second child. After a hearing on the petitions, the court dismissed the father's custody modification petition and entered an order that restricted the father's parenting time, ordered attorney's fees to the mother, and made a temporary custodian appointment pursuant to Indiana Code section 31-17-2-11.²¹⁹

The trial court's parenting time restriction essentially allowed the mother to determine whether the second child's—who was in the mother's custody—contact with the first child—who was in the father's custody—should be limited or restricted in any way, including no contact.²²⁰ If the mother and father were unable to resolve parenting time conflicts, or were unable to agree on an ultimate method for the father to exercise his parenting time then the court ordered that the father would not be entitled to parenting time with the second child while the child in his custody was present.²²¹

On appeal, the father argued that this restriction on his parenting time was clearly erroneous and the court agreed.²²² Indiana Code section 31-17-4-2 governs modification and restriction of parenting time.²²³ The court opined that

217. 831 N.E.2d 758 (Ind. Ct. App. 2005).

218. *Id.* at 761.

219. *Id.* IND. CODE § 31-17-2-11 (2005) provides as follows:

(a) If, in a proceeding for custody or modification of custody under IC 31-15, this chapter,

IC 31-17-4, IC 31-17-6, or IC 31-17-7, the court:

(1) requires supervision during the noncustodial parent's parenting time privileges; or

(2) suspends the non-custodial parent's parenting time privileges;

the court shall enter a conditional order naming a temporary custodian for the child.

(b) A temporary custodian named by the court under this section receives temporary custody of the child upon the death of the child's custodial parent.

(c) Upon the death of a custodial parent, a temporary custodian named by a court under this section may petition the court having probate jurisdiction over the estate of the child's custodial parent for an order under IC 29-3-3-6 naming the temporary custodian as the temporary guardian of the child.

220. *See Barger*, 831 N.E.2d at 764.

221. *Id.*

222. *Id.*

223. IND. CODE § 31-17-4-2 (2005) provides as follows:

The court may modify an order granting or denying parenting time rights whenever a modification would serve the best interests of the child. However, the court shall not restrict a parent's parenting time rights unless the court finds that the parenting time

the statutory language of Indiana Code section 31-17-4-2 was clear and unambiguous.²²⁴ “Parenting time may not be restricted absent a finding by the *court* that the interaction might endanger the child’s health or significantly impair his or her emotional development.”²²⁵ Here, the trial court had failed to comply with the statute because there was “a total absence of evidence that [the child in the father’s custody] posed a danger,” physically or emotionally, to the child in the mother’s custody.²²⁶ In fact, the evidence suggested the children had bonded and were emotionally close.²²⁷ “Conferring upon Mother prerogative to enforce the restriction at her discretion is contrary to statute. Accordingly, the parenting time restriction is reversed.”²²⁸ Because the restrictions on parenting time were contrary to law, the appointment of a temporary custodian was contrary to law and clearly erroneous.²²⁹

The trial court also ordered the father to pay the mother’s attorney \$7800 within thirty days. The appeals court acknowledged that Indiana Code section 31-17-7-1 allows a court to order a party to pay a reasonable amount for the other parties’ attorney’s fees when one party is in a superior position to pay fees over the other party.²³⁰ However, evidence must be presented indicating that the parties’ economic circumstances differ significantly.²³¹ In this case, the mother did not present evidence that her economic circumstances differed significantly from those of the father and, in fact, the child support worksheets filed by the parties indicated that their incomes were substantially similar.²³² The amount of the award was based upon the mother’s petition for attorney’s fees which listed litigation events with no corresponding time expenditure. Also, there was no evidence of record supporting the reasonableness of the fee. The award of attorney’s fees was reversed.²³³

C. Guardianship

In a proceeding to determine whether to place a child with a person other than a natural parent, the Indiana Supreme Court has mandated that the trial court must make specific findings of fact in support of its decision.²³⁴ The purpose of these detailed and specific findings is to make certain that the court has determined by

might endanger the child’s physical health or significantly impair the child’s emotional development.

224. *Barger*, 831 N.E.2d at 763.

225. *Id.*

226. *Id.*

227. *Id.* at 764.

228. *Id.* at 764-65.

229. *Id.*

230. *Id.* at 765.

231. *Id.* (citing *In re Marriage of Bartley*, 712 N.E.2d 537, 546 (Ind. Ct. App. 1999)).

232. *Id.*

233. *Id.*

234. *In re Guardianship of B.H.*, 770 N.E.2d 283, 287 (Ind. 2002).

clear and convincing evidence that the natural parents' unfitness or acquiescence in the third party custody has been established and that a strong emotional bond has been established between the child and the third person.²³⁵ Because there is a strong presumption that the child's best interests are served by placement with the natural parent, it is important that this presumption is clearly and convincingly overcome by evidence that the child's best interests are substantially and significantly served by placement with another person. Additionally, the detailed and specific findings serve to further alert the parents to the reasons why their children are in third party custody so that they know the steps they have to take to have the children returned to them.²³⁶

The issue in the case of *In re Guardianship of A.R.S.*²³⁷ is whether these requirements of specific findings of fact need to be made by the trial court in a proceeding to terminate guardianship in the absence of a request pursuant to Trial Rule 52(A). The mother had petitioned to terminate the maternal grandparents' guardianship of her two children in which she had previously acquiesced. The mother alleged that "[t]he guardianship is no longer necessary because the children's mother is able to provide them suitable care and custody."²³⁸ The trial court conducted a hearing and, without making specific findings, denied the mother's petition to terminate the guardianship, relying on Indiana Code section 29-3-12-1.²³⁹ The mother appealed alleging that the trial court had applied an incorrect burden of proof, failed to make specific findings in support of its order, and that the order was not supported by the evidence.²⁴⁰

On appeal, the appellate court, over the dissent of Judge Crone, reversed and remanded to the trial court to make specific findings of fact using the clear and convincing evidence standard.²⁴¹ In arriving at its decision, the court of appeals extended the requirement of specific findings of fact enunciated in *In re Guardianship of B.H.* to petitions to terminate a guardianship.²⁴² The grandparents had correctly pointed out that neither party had requested findings and that the statute governing termination of guardianship does not require specific findings. In deciding otherwise, the court stated:

We see no reason not to extend this requirement of detailed findings to petitions to terminate guardianship. We do so for two reasons. First, the issues are the same regardless of whether the placement is the initial

235. *Id.*

236. *Id.*

237. 816 N.E.2d 1160 (Ind. Ct. App. 2004).

238. *Id.* at 1161.

239. IND. CODE § 29-3-12-1 (2005) provides in part that "the court may terminate any guardianship if: . . . (4) the guardianship is no longer necessary for any other reason."

240. *In re Guardianship of A.R.S.*, 816 N.E.2d at 1162.

241. *Id.* at 1163. In addition to the lack of specific findings of fact, the court noted that it was unable to determine from the trial court's order whether the trial court had used "preponderance of the evidence" or "clear and convincing evidence." *Id.*

242. *Id.* at 1162.

placement or a question of whether the placement should be continued. Second, the reason behind requiring detailed and specific findings applies in equal force to termination of guardianship petitions, i.e. notifying the parties and the reviewing court of the facts and theory upon which the decision is based.²⁴³

In his dissent, Judge Crone disagreed that the court should expand the special finding requirement to subsequent guardianship proceedings.²⁴⁴ Judge Crone believed the requirement of special findings on the denial of every petition for modification or termination is overly burdensome to the trial court.²⁴⁵ Crone stated that because guardianships “spawn many relatively meritless petitions, . . . [they] should be dealt with as efficiently and expeditiously as possible.”²⁴⁶ Crone noted that if either of the parties wanted specific findings, they could avail themselves of Trial Rule 52(A).²⁴⁷

III. CHILD SUPPORT

A. *College Expenses*

1. *Repudiation*.—Indiana law recognizes that a child’s repudiation of a parent—that is, a complete refusal to participate in a relationship with his or her parent—under certain circumstances—will obviate a parent’s obligation to pay certain expenses, including college expenses.²⁴⁸ Indiana case law clearly establishes that only an adult child over eighteen years of age can repudiate his relationship with a parent.²⁴⁹ In *Norris v. Pethe*,²⁵⁰ the trial court found that the child had rejected all of the father’s efforts to establish a relationship including the child’s participation in court ordered counseling, refusing cards and gifts, and discouraging the father’s attendance at any of her extracurricular activities.²⁵¹ Consequently, the trial court found that the father had no duty to pay the child’s college expenses.²⁵²

On appeal, the court noted that the father had testified regarding numerous attempts to have a relationship with his daughter and that she rejected them all.²⁵³

243. *Id.* The court also noted that the absence of findings had hampered its review of the case. *Id.* at 1163.

244. *Id.* (Crone, J., dissenting).

245. *Id.*

246. *Id.*

247. *Id.*

248. *Norris v. Pethe*, 833 N.E.2d 1024, 1033 (Ind. Ct. App. 2005) (citing *Bales v. Bales*, 881 N.E.2d 196, 199 (Ind. Ct. App.), *reh’g denied, trans. denied*, 812 N.E.2d 807 (Ind. 2004)).

249. *Id.* at 1034; *McKay v. McKay*, 644 N.E.2d 164, 168 (Ind. Ct. App. 1994) (citing *Milne v. Milne*, 556 A.2d 854, 856 (Pa. Super. Ct. 1989)).

250. 833 N.E.2d 1024.

251. *Id.* at 1033.

252. *Id.* at 1032.

253. *Id.* at 1033-34.

The court observed that although the child's behavior towards her father started as a minor, it continued when she became an adult and well after her eighteenth birthday.²⁵⁴ In holding that the trial court did not commit error in finding that the child had repudiated her father which relieved him of his obligation to contribute to her college expenses, the court, referencing language in *McKay v. McKay*,²⁵⁵ stated: "[T]his child will not, in any event, be allowed to enlist the aid of the court in compelling [a] parent to support his or her educational efforts unless and until the child demonstrates a minimum amount of respect and consideration for that parent."²⁵⁶ It is important to note that orders finding a repudiation are limited to an adult child who completely rejects a relationship with his or her parent.²⁵⁷

2. *Modification After Child Turns Twenty-one.*—Indiana has long held that a trial court is authorized to consider petitions to modify support to include college expenses only where those petitions are first filed before the child reaches twenty-one years of age or is otherwise emancipated.²⁵⁸ The court is not authorized to order for the first time that college expenses be paid after the child's emancipation or attaining twenty-one.²⁵⁹ The supreme court held in *Donegan v. Donegan*²⁶⁰ that: "Where educational needs are expressly included in a support order enacted prior to a child's emancipation or attaining age 21, the trial court is authorized to continue to address such educational needs."²⁶¹ The case of *Martin v. Martin*, decided by the Indiana Supreme Court in 1986, set forth the rule:

The statute [Indiana Code section 31-16-6-6(a)(1)] does not authorize adult children to use post dissolution proceedings to finance the expenses of college commenced or resumed later in life. . . . The statutory language is clear. Where educational needs are expressly included in a support order enacted prior to a child's emancipation or attaining age 21, the trial court is authorized to continue to address such educational needs.²⁶²

In *Brodt v. Lewis*,²⁶³ the court was asked to address a specific settlement agreement. The issue presented was whether the parties' settlement agreement, which provided that the father would pay one-half of their child's school supplies,

254. *Id.* at 1034.

255. 644 N.E.2d 164 (Ind. Ct. App. 1994).

256. *Norris*, 833 N.E.2d at 1034.

257. *See id.* at 1033-34. Compare this to the holding in *Staresnick v. Staresnick*, 830 N.E.2d 127, 132-34 (Ind. Ct. App. 2005), *reh'g denied* (Ind. Ct. App. 2006), in which the child's reluctance to participate in a relationship with the father, although significant, did not amount to a complete refusal to participate in a relationship with the parent.

258. *Donegan v. Donegan*, 586 N.E.2d 844, 845 (Ind. 1992).

259. *Id.*

260. 586 N.E.2d 844.

261. *Id.* (quoting *Martin v. Martin*, 495 N.E.2d 523, 525 (Ind. 1986)).

262. *Martin*, 495 N.E.2d at 525.

263. 824 N.E.2d 1288 (Ind. Ct. App. 2005).

book rental, and certain education needs, allowed the court to continue to consider college expenses when a petition seeking an order for college expenses was filed after the child's twenty-first birthday.²⁶⁴

In *Brodt*, the parties entered into a settlement agreement when the child was six months old. They had agreed that in addition to child support, the father would pay for "half of the costs for school supplies, book rental, and child care expenses."²⁶⁵ The agreement was subsequently modified twice with the child's clothing allowance being terminated in the last modification. Neither order addressed post-secondary educational expenses. Twenty-one years later, after the child had reached her twenty-first birthday, her mother filed a petition requesting that a child support obligation be modified to include college expenses. The trial court denied the request for modification to add college expenses on the grounds that modification to add college expenses could not be filed for the first time after the child had attained the age of twenty-one years.²⁶⁶ The mother appealed, contending that the parties' settlement agreement had provided that the father was obligated to pay half of the child's school supplies and book rental and because these educational needs had never been terminated in the subsequent modifications, the trial court could, in fact, require the father to pay college expenses even after the child had turned twenty-one years of age.²⁶⁷

On appeal, the court rejected the mother's argument.²⁶⁸ The court noted that although the original agreement did provide for payment of "school supplies" and "book rental," that agreement and the subsequent modifications were silent as to post-secondary educational expenses.²⁶⁹ The court stated that educational expenses associated with college typically "receives an expansive interpretation in the case law and . . . includes . . . tuition, books, lab fees, supplies and student activity fees."²⁷⁰ But, in this case, a clear reading of the parties' original agreement revealed that it contemplated only elementary and secondary educational charges.²⁷¹ In distinguishing post-secondary educational needs from earlier expenses the court stated:

However, whereas the definition of educational needs clearly seems to be geared towards college life, our reading of the parties' 1983 settlement agreement appears to focus solely upon the costs related to elementary and secondary education where the charges for school supplies and book rental are more common than in post-secondary education. As included in the Commentary to Ind. Child Supplemental Guideline 6, Extraordinary Expenses, regular elementary and secondary school

264. *Id.* at 1290.

265. *Id.* at 1292.

266. *Id.* at 1290.

267. *Id.* at 1291.

268. *Id.* at 1292-93.

269. *Id.* at 1292.

270. *Id.*

271. *Id.*

expenses are covered by the basic child support obligation. Moreover, an educational support order is premature when a child is too young to assess her aptitude and ability, such as [the child] was at the time the agreement was made. *See* I.C. § 31-16-6-2; *Moss v. Frazier*, 614 N.E.2d 969 (Ind. Ct. App. 1993).²⁷²

3. *Limitation to Indiana State Supported College.*—In *Snow v. Rincker*,²⁷³ the court decided whether a parent's contribution to a child's college education should be limited to the cost of an Indiana state-supported institution.²⁷⁴ The parties, who had one child, were divorced in 1985.²⁷⁵ The original order did not require the father to pay for the child's college expenses. The child, an exceptional student, attended an expensive out-of-state private college.²⁷⁶ The child's father earned approximately \$41,700 per year and this represented fifty-nine percent of the parties' combined income. The mother took out a \$50,000 loan to pay for the first three years of her daughter's college, and the daughter borrowed an additional \$11,000 and also received scholarships. The father did not contribute, and the mother petitioned for a modification asking that the father contribute to college expenses.²⁷⁷ The trial court ordered the father to pay fifty-nine percent of the child's senior year expenses at college. The trial court found that the child should be responsible for one-third of her educational expenses for the next two years and that the father should pay fifty-nine percent of the balance of the expenses.²⁷⁸ The father appealed, contending that the trial court should have capped his contribution based upon costs at a level consistent with the tuition and costs at a state supported university or college in Indiana.²⁷⁹ The

272. *Id.*

273. 823 N.E.2d 1234 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 749 (Ind. 2005).

274. *Id.* at 1237.

275. *Id.* at 1236.

276. There was some question as to whether or not the child could obtain a similar education at an Indiana state-supported university.

277. *Snow*, 828 N.E.2d at 1236.

278. *Id.* at 1238.

279. *Id.* at 1237. IND. CODE § 31-16-6-2 (2005) governs educational support and provides in relevant part:

- (a) The child support order or an educational support order may also include, where appropriate:
 - (1) amounts for the child's education in elementary and secondary schools and at institutions of higher learning, taking into account:
 - (A) the child's aptitude and ability;
 - (B) the child's reasonable ability to contribute to educational expenses through:
 - (i) work;
 - (ii) obtaining loans; and,
 - (iii) obtaining other sources of financial aid reasonably available to the child and each parent; and,
 - (C) the ability of each parent to meet these expenses;

court's order would have reduced the funds available to the father with which to support himself to well below the poverty level for a one-person household.²⁸⁰ Relying upon Indiana Code section 31-16-6-2 and the commentary to Indiana Child Support Guideline 6, the appellate court held that it was an abuse of discretion for the trial court to plunge the father into poverty for a degree that could have been earned at a less expensive, state-supported university.²⁸¹ The court of appeals noted that the trial court appeared to try to "even the playing field" by considering that the mother had incurred \$50,000 in prior loans.²⁸² The court of appeals characterized this as a "makeup payment" that the court cannot condone.²⁸³ The court of appeals reversed and remanded with instructions to cap

...

(b) If the court orders support for a child's educational expenses at an institution of higher learning under subsection (a), the court shall reduce other child support for that child that:

- (1) is duplicated by the educational support order; and
- (2) would otherwise be paid to the custodial parent.

IND. CHILD SUPP. G. 6 provides as follows:

Extraordinary education expenses may be for elementary, secondary or post-secondary education, and should be limited to reasonable and necessary expenses for attending private or special schools, institutions of higher learning, and trade, business or technical schools to meet the particular educational needs of the child.

...

(b) Post-Secondary Education. The authority of the Court to award post-secondary educational expenses is derived from IC 31-16-6-2. It is discretionary with the court to award post-secondary education expenses and in what amount. In making such a decision, the court should consider post-secondary education to be a group effort, and weigh the ability of each parent to contribute to payment of the expense, as well as the ability of the student to pay a portion of the expense.

If the court determines that an award of post-secondary educational expenses is appropriate, it should apportion the expenses between the parents and the child, taking into consideration . . . scholarships, grants, student loans, summer and school year employment, and other cost-reducing programs available to the student. These . . . sources of assistance should be credited to the child's share of the educational expense

....

...

The court may limit consideration of college expenses to the cost of state supported colleges and universities or otherwise may require that the income level of the family and the achievement level of the child be sufficient to justify the expense of private school.

IND. CHILD SUPP. G. 6 (2004), available at http://www.in.gov/judiciary/rules/child_support/child_support.pdf.

280. *Snow*, 823 N.E.2d at 1239. The father was not remarried. *Id.* at 1235.

281. *Id.* at 1234.

282. *Id.* at 1239.

283. *Id.*

the father's expenses based upon costs consistent with tuition and costs at a state supported university.²⁸⁴ Judge Sharpnack dissented in part, noting in particular that he felt that the father had not offered enough evidence regarding his financial status to establish that the order of the trial court represented an unacceptable burden.²⁸⁵ Furthermore, he stated that although limitation to the cost of a state school may be reasonable in some circumstances, "it is not a benchmark."²⁸⁶

4. *Cost of Child Care*.—In *Thomas v. Orlando*,²⁸⁷ the court decided whether it was proper to include the cost of child care that a mother incurred while attending college in determining a father's child support obligation. After paternity was established, the trial court entered an order that allowed child care expenses to be a component of child support during the period of time when the mother was attending college rather than working.²⁸⁸ The father appealed, and on appeal the court determined that such an allocation of child care expenses as a component of child support was proper.²⁸⁹

The father's argument relied upon Indiana Child Support Guideline 3(E) and the commentary which specifies in part, that

[c]hild care costs incurred due to employment or job search of both parent(s) should be added to the basic obligation. It includes the separate cost of a sitter, day care, or like care of a child or children while the parent works or actively seeks employment. Such child care costs must be reasonable and should not exceed the level required to provide quality care for the children. Continuity of child care should be considered. Child care costs required for active job searches are allowable on the same basis as costs required in connection with employment.

...

Work-related child care expense is an income-producing expense of the parent. Presumably, if the family remained intact, the parents would treat child care as a necessary cost of the family attributable to the children when both parents work. Therefore, the expense is one that is incurred for the benefit of the child(ren) which the parents should share.²⁹⁰

Specifically, the father contended that being a full-time student does not qualify as a "work-related activity" for which child care may be reimbursed.²⁹¹ The appellate court disagreed, noting that:

Indeed, we believe that it is a parent's responsibility to continually try to

284. *Id.* at 1240-41.

285. *Id.* at 1241 (Sharpnack, J., concurring and dissenting).

286. *Id.*

287. 834 N.E.2d 1055 (Ind. Ct. App. 2005).

288. *Id.* at 1057.

289. *Id.* at 1059.

290. *Id.* at 1058; IND. CHILD SUPP. G. 3(E) & cmt. 1 (2004), available at http://www.in.gov/judiciary/rules/child_support/child_support.pdf.

291. *Thomas*, 834 N.E.2d at 1058.

better herself and to create more and better opportunities for the child and the family unit. We are hard pressed to come up with a better example of a way to do just that than by pursuing an education, be it high school, college, or graduate school. A parent who finds within herself the diligence and ambition to obtain a degree will be rewarded not only with better job prospects and increased earning potential, but also with a child who has learned by example that education is essential and valuable.²⁹²

The court concluded by pointing out that education is designed to benefit both the parents and the child and that “childcare expenses that are incurred because the parent with primary custody is a full-time student are income-producing expenses as contemplated by the Guidelines.”²⁹³

5. *Jurisdiction*.—The jurisdiction of the trial court to enter an order for college expenses under the Uniform Interstate Family Support Act (“UIFSA”)²⁹⁴ was at issue in *Johnston v. Johnston*.²⁹⁵ The mother filed a petition to modify the dissolution decree and sought educational support for her college age children. The father, who had no contact with Indiana, did not appear in the dissolution action but did sign a waiver of final hearing in a subsequent action to modify the dissolution decree.²⁹⁶ The dissolution was granted by the trial court, but no child

292. *Id.* at 1059.

293. *Id.*

294. IND. CODE § 31-18-1-1 to -9-4 (2005). IND. CODE 31-18-2-1 provides:

In a proceeding to establish, enforce, or modify a support order or to determine paternity, an Indiana tribunal may exercise personal jurisdiction over a nonresident individual or the individual’s guardian or conservator if:

- (1) the individual is personally served with notice in Indiana;
- (2) the individual submits to the jurisdiction of Indiana by:
 - (A) consent;
 - (B) entering an appearance, except for the purpose of contesting jurisdiction; or
 - (C) filing a responsive document having the effect of waiving contest to personal jurisdiction;
- (3) the individual resided in Indiana with the child;
- (4) the individual resided in Indiana and has provided prenatal expenses or support for the child;
- (5) the child resides in Indiana as the result of acts or directives of the individual;
- (6) the individual engaged in sexual intercourse in Indiana and the child:
 - (A) has been conceived by the act of intercourse; or
 - (B) may have been conceived by the act of intercourse if the proceeding is to establish paternity;
- (7) the individual asserted paternity of the child in the putative father registry administered by the state department of health under IC 31-19-5; or
- (8) there is any other basis consistent with the Constitution of the State of Indiana and the Constitution of the United States for the exercise of personal jurisdiction.

295. 825 N.E.2d 958 (Ind. Ct. App. 2005).

296. *Id.* at 960-61.

support petition had ever been filed, and no order regarding child support payment was entered into the record.²⁹⁷ Thereafter, the parties had apparently entered into an informal agreement based upon Ohio law whereby the father paid child support until the last child had turned eighteen years of age.²⁹⁸ After the children had finished high school and began to attend college, their mother filed a petition to modify the dissolution decree wherein she sought an educational support order. The father entered an appearance solely for the purpose of contesting personal jurisdiction and filed a motion to dismiss. After hearing the evidence, the court granted the mother's petition and entered an educational support order requiring the father to pay some of the children's college expenses.²⁹⁹ The trial court had noted that the waiver of final hearing signed by the father subjected the father to the court's jurisdiction. The father appealed.

On appeal, the father argued that the trial court erroneously found that personal jurisdiction under UIFSA existed because of the signed waiver of final hearing in the dissolution action.³⁰⁰ He argued that because UIFSA applies only in the establishment, enforcement, or modification of support orders or with respect to determination of paternity issues, his waiver of the final hearing in the petition to modify the dissolution—where support had not been addressed—did not amount to his submission to the jurisdiction of the court on the child support matter.³⁰¹ The court of appeals agreed that a dissolution action does not require in personam jurisdiction of both parties.³⁰² However, a proceeding with regard to a child support order incident to the marriage does require in personam jurisdiction of both parties.³⁰³ Furthermore, citing Indiana Code section 31-18-2-1, the court noted that UIFSA provisions are not applicable to dissolution matters.³⁰⁴ A judgment entered without "minimum contacts" violates the due process clause of the Fourteenth Amendment.³⁰⁵ The UIFSA, itself, enumerates eight conditions that are intended to satisfy the due process requirements of minimum contacts.³⁰⁶ The court noted that even if the UIFSA "would have" applied, the father did not meet any of those enumerated minimum contacts, did not submit to jurisdiction, and had never done anything inconsistent to his position of contesting jurisdiction.³⁰⁷

297. *Id.* at 960.

298. *Id.* Two children were born to the parties. *Id.*

299. *Id.* at 961-62.

300. *Id.* at 963.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.* (citing *In re Paternity of A.B.*, 813 N.E.2d 1173, 1175 (Ind. 2004)). For a discussion of *In re Paternity of A.G.*, see Michael G. Ruppert & Joseph W. Ruppert, *Recent Developments: Indiana Family Law*, 38 IND. L. REV. 1085, 1100 (2005).

306. *Johnston*, 825 N.E.2d at 963.

307. *Id.* at 965.

B. Modification Due to Change in Income

During the current survey period, the Indiana Supreme Court decided *McLafferty v. McLafferty*.³⁰⁸ In the proceedings below, the father had moved to modify the child support based upon the mother's increase in income.³⁰⁹ The trial court granted the motion and the court of appeals affirmed.³¹⁰ The supreme court granted transfer, vacated the court of appeals opinion, and reversed the trial court.³¹¹

The trial court had reduced the father's child support obligation by approximately fourteen percent after the custodial mother obtained full time employment which increased her income by \$385 per week. During the same period of time, the father's income also increased.

Even though the trial court had found a substantial change in circumstances, the supreme court considered both subsections of Indiana Code section 31-16-8-1, which provide alternative methods for modifying child support.³¹² A party can show either a change in circumstance that is substantial and continuing or the party can show that the order of child support differs by more than twenty percent from the amount that would be ordered by applying the child support guidelines provided it has been more than twelve months since that order was set.³¹³ The Indiana Supreme Court noted that Indiana Code section 31-16-8-1(2)(A) was not available to the father because the amount that he would be ordered to pay pursuant to the Indiana Child Support Guidelines differed by less than twenty percent.³¹⁴ Therefore, the father had the burden of establishing changed circumstances which were so substantial and continuous as to make the original order unreasonable. The court observed that "a determination of whether or not the change in circumstances asserted is 'so substantial and continuing' as to render the prior child support order's terms 'unreasonable' is, at minimum, a

308. 829 N.E.2d 938 (Ind. 2005).

309. *Id.* at 939.

310. *Id.*; see *McLafferty v. McLafferty*, 811 N.E.2d 450, 456-57 (Ind. Ct. App. 2004), *vacated* by 829 N.E.2d 938 (Ind. 2005).

311. *McLafferty*, 829 N.E.2d at 943. Justice Dickson dissented without opinion.

312. *Id.* at 939-40. IND. CODE 31-16-8-1 (2005) provides in pertinent part as follows:

Provisions of an order with respect to child support . . . may be modified or revoked . . . [M]odification may be made only:

- (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or
- (2) upon a showing that:
 - (A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and
 - (B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed.

313. IND. CODE 31-16-8-1.

314. *McLafferty*, 829 N.E.2d at 940.

mixed question of law and fact.”³¹⁵ Subsection (2) of the statute had been added by the legislature in 1997.³¹⁶ In analyzing this amendment the supreme court stated that:

Our interpretation of the Legislature’s action in 1997 is that it wanted to provide a bright-line for parents and for courts as to when a parent would be entitled to modification in his or her child support obligation solely on grounds of change in income. . . . The legislature left in place the opportunity for a parent to request modification at any time and for any reason so long as—but only if—the parent could show changed circumstances “so substantial and continuing as to make the terms [of the prior order] unreasonable.”³¹⁷

The court reasoned that the legislature had established a bifurcated standard for modification with subsection (2) governing situations where modification is sought solely on grounds of change of income and subsection (1) governing all other situations, including those alleging a change in income and other changes.³¹⁸ Thus, although a parent could theoretically use subsection (1) to seek a modification solely on grounds of change of income, the court did not believe that the legislature had intended to create a situation where the only alleged change of circumstance under subsection (1) would result in a change of one parent’s payment by less than twenty percent.³¹⁹ The court found that in order for subsection (1) to be used when the change of circumstance alleged is a change in one parent’s income that only changes one parent’s payment by less than twenty percent, there must be other factors present that make the modification permissible under the terms of the statute.³²⁰ The Indiana Supreme Court found that, in this case, such other factors did not exist.³²¹ In reversing the trial court, the supreme court reinstated the father’s original child support order and directed the trial court to set a hearing to determine a schedule for the father to pay the amount that had accrued as a result of the decision.³²²

C. Modification Based Upon Parenting Time Credit

The commentary to Indiana Child Support Guideline 6 explains the parenting time credit, in part, as follows:

[A] parenting credit based upon the number of overnights with the noncustodial parent ranging from 52 overnights annually to equal

315. *Id.* at 941.

316. *Id.* at 941 n.4; see 1997 Ind. Legis. Serv. P.L. 1-1997 (S.E.A. 8) (West).

317. *McLafferty*, 829 N.E.2d at 941-42 (alteration in original) (quoting IND. CODE § 31-16-8-1(1) (2004)).

318. *Id.* at 942.

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.* at 943.

parenting time. As parenting time increases, a proportionately larger increase in the credit will occur.

A change in a child support order through the application of a parenting time credit does not constitute good cause for modification of the order unless the modification meets the requirements of Guideline 4.³²³

The question arises, then, whether application of the parenting time credit may be included in the trial courts' calculation in determining whether a petitioner has fulfilled his statutory burden to modify support. In a case of first impression, *Naville v. Naville*³²⁴ asked the court of appeals to address this very issue. The issue in *Naville*, as stated by the court of appeals, was

whether a petitioner seeking a modification of a child support order must meet the requirements of Indiana Code section 31-16-8-1 without factoring in a parenting time credit to receive such credit, or whether instead the parenting time credit may be included in the trial court's calculation as it determines whether petitioner has fulfilled its statutory burden.³²⁵

The mother and father were divorced in 1994.³²⁶ The father was required to pay \$215 per week in child support for the parties' two minor children and was granted visitation rights pursuant to the court visitation guidelines.³²⁷ In 1999 the father was granted a modification of visitation such that he began enjoying 148 overnights annually with the children. In 2004, the father filed a motion to modify support. Both parties incomes had changed substantially since 1994 and the trial court granted a modification from \$215 per week to \$79.70 per week based upon the parties' incomes and after the application of the parenting time credit.³²⁸ The mother appealed.

On appeal, the mother argued that the trial court committed error in granting the modification of child support based upon a parenting time credit.³²⁹ The mother contended that a child support order may not be modified solely based upon a parenting time credit but instead the modification must first meet the

323. IND. CHILD SUPP. G. 6 (2004), available at http://www.in.gov/judiciary/rules/child_support/child_support.pdf. Referencing Indiana Code section 31-16-8-1, Indiana Child Support Guideline 4 provides that a child support order "may be modified only if there is substantial and continuing change of circumstances." IND. CHILD SUPP. G. 4.

324. 818 N.E.2d 552 (Ind. Ct. App. 2004).

325. *Id.* at 556. The court noted that the "commentary to Guideline 6 cautions that applying a parenting time credit is not good cause for modifying a child support order 'unless the modification meets the requirements of Guideline 4.'" *Id.*

326. *Id.* at 554.

327. The father was also allowed a fifty percent abatement in support for any full week that the children lived with him pursuant to the old county guidelines.

328. *Naville*, 818 N.E.2d at 559.

329. *Id.* at 555.

requirements of Indiana Code section 31-16-8-1 independent of the parenting time credit. The court agreed that the modification of a child support order must meet the requirements of Indiana Code section 31-16-8-1, but both the statute and Guideline 4 were not clear in whether the court could apply the parenting time credit in determining whether the petitioner has met the statutory requirements.³³⁰ The court noted, neither the statutory language nor the commentary specified that the parenting time credit “should be ignored when applying either the ‘substantial and continuing’ change in circumstances test or the twenty percent change test.”³³¹ The court agreed with the mother that the application of the parenting time credit alone does not justify modification.³³²

In clarifying this situation, the court stated that a petitioner seeking modification of a support order must still meet either the substantial and continuing change of circumstances test or the twenty percent change test to be successful.³³³ However, in attempting to fulfill either test, the petitioner for modification of child support may apply the parenting time credit.³³⁴ In *Naville*, the application of the parenting time credit satisfied the twenty percent change test.³³⁵ As such, the trial court was correct in granting the father’s petition for modification. Not every case, the court observed, would result in a successful petition for modification of child support solely by applying the parenting time credit.³³⁶

D. Non-Conforming Child Support Payments

In Indiana, the general rule is that, except in narrow circumstances, a parent will not be given credit for the payment of child support that is not confirming to the child support order.³³⁷ In *Decker v. Decker*,³³⁸ the father had not paid child support in over ten years and was approximately \$43,000 in arrears.³³⁹ The father

330. *Id.* at 556.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* In *Naville*, the application of the parenting time credit more than met the twenty percent change test. Therefore, the court did not consider whether the parties change in incomes together with the other factors that were present constituted “a substantial and continuing change of circumstances.” *Id.* at 556-57.

337. *Kaplon v. Harris*, 567 N.E.2d 1130, 1133 (Ind. 1991). The exceptions to this rule are for “payments made directly to the mother, payment made via an alternative method agreed to by the parties and substantially complying with the existing decree, and payments covered when the non-custodial parent takes custody of the children with the other parent’s consent.” *Id.* The court also found a “narrow exception” to the no-credit rule for payments toward the child’s funeral expenses. *Id.*

338. 829 N.E.2d 77 (Ind. Ct. App. 2005).

339. *Id.* at 78-79.

testified that he and the mother had verbally agreed that he would provide child care for their child while the mother was at work and in return would not be required to pay child support. There was some dispute about whether the father and the mother had executed written agreements memorializing this arrangement, but regardless, none of the reported written agreements had ever been submitted to the court for approval. The trial court found the father to be in arrears in the amount of \$43,105 and the father appealed.³⁴⁰

On appeal, the father argued that he should not be ordered to pay any child support arrearage because he had provided child support in the form of child care while the mother was at work. He argued that this was an alternative method of payment agreed to between the mother and himself. The father relied on the case of *Payson v. Payson*,³⁴¹ in which the mother and father had agreed that the father could make direct payments to the mother and to third parties for rent instead of through the clerk of the court, as ordered.³⁴² However, the court of appeals in *Decker* found that the father's reliance upon *Payson* was misplaced.³⁴³ In *Payson*, the father had provided proof in the form of canceled checks that he had in fact made the payments. In *Decker*, the court of appeals found that the father had failed "to provide any evidence as to the frequency with which he provided child care, or how much money Father saved Mother by providing child care."³⁴⁴ As such, the father could not prove that he substantially complied with the decree requiring him to pay weekly installments of money to the clerk.³⁴⁵

Judge Sullivan concurred with a separate opinion and cautioned that the majority opinion implied that:

"substantial compliance" may be effected only by payments of money to someone providing goods or services. It also does not acknowledge that in *Payson v. Payson*, cited by the majority, the court stated that credit, might, in equity, be given for substantial compliance "with the *spirit* of the original support decree." The spirit of an order to pay support through the Clerk of Court may be met by "money or its equivalent" and might include the provision of services or tangible goods such as groceries.³⁴⁶

Judge Sullivan concluded that had the father produced evidence of the frequency and value of the child care provided, a different result might well have been reached.³⁴⁷

340. *Id.* at 79.

341. 442 N.E.2d 1123 (Ind. Ct. App. 1982).

342. *Decker*, 829 N.E.2d at 80.

343. *Id.*

344. *Id.*

345. *Id.* The matter was remanded to the trial court because of an error in calculation of the child support order. *Id.*

346. *Id.* at 81 (Sullivan, J., concurring) (internal citations omitted).

347. *Id.*

E. Provisional Arrearage

In *Trent v. Trent*,³⁴⁸ the father had accumulated a child support arrearage of \$6519 pursuant to a provisional order.³⁴⁹ The decree of dissolution granted custody of the children to the mother and ordered the father to pay child support. However, the dissolution decree did not address the father's child support resulting from the provisional order. Three years later, the parties agreed to modify custody and the father was awarded the custody of the children. The mother agreed to pay child support.

After the children were emancipated and more than twelve years after the parties were divorced, the deputy prosecutor filed an affidavit for citation alleging that the mother had failed to pay child support.³⁵⁰ The mother countered by stating that she had previously stopped paying child support based upon a verbal agreement with the father. Furthermore, she alleged that the father was in arrears in child support, a portion of which was child support ordered pursuant to the provisional order. She likewise filed a citation against the father. At hearing, the trial court found that (1) the amount of the arrearage that the father owed, including the provisional arrearage, was approximately equal to the arrearage owed by the mother; (2) that both parties had unreasonably delayed in taking action; and (3) that in the interest of equity the outstanding arrearages canceled each other and the citations were dismissed.³⁵¹

The father appealed, contending that the inclusion of the provisional arrearage was error because it had not been addressed by the dissolution decree. The father argued that the arrearage that had been accrued under the provisional order was extinguished by the dissolution decree.³⁵²

On appeal, the court agreed with the father and discussed the rule of merger of the provisional order with the dissolution decree.³⁵³ The court stated that:

The general rule of merger is that when a valid and final personal judgment is rendered in favor of the plaintiff, the original debt or cause of action, or underlying obligation upon which an adjudication is predicated is said to be merged into the final judgment, and the plaintiff cannot maintain a subsequent action on any part of the original claim, because the doctrine of merger operates to extinguish a cause of action on which a judgment is based and bars a subsequent action for the same

348. 829 N.E.2d 81 (Ind. Ct. App. 2005).

349. *Id.* at 82.

350. *Id.* at 83.

351. *Id.* at 84. The trial court noted that the father took more than four years after the mother's support obligation had stopped to bring his citation and that the mother had failed to prosecute her citation and modification until brought into court on the father's citation. *Id.*

352. *Id.* at 85. IND. CODE § 31-15-4-14 (2005) governs the termination of provisional orders and provides: "A provisional order terminates when: (1) the final decree is entered subject to right of appeal; or (2) the petition for dissolution or legal separation is dismissed."

353. *Trent*, 829 N.E.2d at 85.

cause.³⁵⁴

In *In re Dean*,³⁵⁵ the doctrine of merger did not prohibit the state from pursuing the father for a provisional arrearage because the state was not a party to the original dissolution proceedings.³⁵⁶

Because the father in *Trent* had accumulated a portion of the arrearage pursuant to a provisional order that was not included in the dissolution decree, pursuant to the doctrine of merger, the provisional order and the arrearage accruing under it were extinguished.³⁵⁷ The trial court erred when it included the provisional arrearage in the amount that the father owed the mother.³⁵⁸

Another issue raised by the father was that the trial court had applied the doctrine of laches in finding that both parties had delayed in pursuing the arrearages and thus were not entitled to relief. The court of appeals agreed.³⁵⁹ Although the trial court's ruling did not specifically use the term "laches" when finding an unreasonable delay, the trial court—in a sense—did apply that very concept.³⁶⁰ The court noted that it had previously held that "the doctrine of laches simply does not apply to child support cases."³⁶¹ As a result, the trial court's finding was clearly erroneous and the proceeding was reversed and remanded back to the trial court.³⁶²

F. Contempt and Incarceration

The father in *Branum v. State*³⁶³ was held in contempt for failure to pay child support and jailed for 120 days.³⁶⁴ On appeal, the father contended that he was not advised of his right to counsel, that the order was punitive in nature, and that his release was not conditioned upon his willingness to comply with the court's order.³⁶⁵ The court agreed:

This court has observed that "[i]t is crystal clear that a person may not be incarcerated by the state without first being advised of his constitutional right to counsel, and, if indigent, without having counsel appointed to represent him, whether the contempt proceedings are initiated by a

354. *Id.* (quoting *In re Dean*, 787 N.E.2d 445, 447 (Ind. Ct. App. 2003)).

355. 787 N.E.2d 445.

356. *Id.* at 448.

357. *Trent*, 829 N.E.2d at 86.

358. *Id.*

359. *Id.* at 87.

360. *Id.* "Laches is neglect for an unreasonable length of time, under circumstances permitting diligence, to do what in law should have been done." *Id.* (internal quotation marks omitted) (quoting *Knaus v. York*, 586 N.E.2d 909, 914 (Ind. Ct. App. 1992)).

361. *Id.* (internal quotation marks omitted) (quoting *Knaus*, 586 N.E.2d at 914).

362. *Id.*

363. 822 N.E.2d 1102 (Ind. Ct. App.), *clarified on reh'g*, 829 N.E.2d 622 (Ind. Ct. App. 2005).

364. *Id.* at 1103.

365. *Id.* at 1104-05.

private person or the state.”³⁶⁶

The court went on to state that on remand, if the court determined that the father was indigent, he had the right to court appointed counsel.³⁶⁷

Indiana has long recognized a persons right to have counsel appointed under such circumstances. As Chief Justice Shepard has observed, “[m]ore than a century before *Gideon v. Wainwright* was decided,” in *Webb v. Baird*, our supreme court recognized an indigent defendant’s right to an attorney at public expense.³⁶⁸

The court also observed that the trial court erred when it did not condition the father’s release from jail on compliance with the support order.³⁶⁹

Our supreme court has held that: “The primary objective of a civil contempt proceeding is not to punish the defendant, but rather to coerce action for the benefit of the aggrieved party. Punishment in the form of imprisonment or a fine levied against the defendant, which goes to the State and not to the injured party, is characteristic of a criminal proceeding. In a civil contempt action the fine is to be paid to the aggrieved party, and the imprisonment is for the purpose of coercing compliance with the order.”³⁷⁰

As such, a finding of contempt and incarceration will be viewed as remedial and not punitive “if the court conditions release upon the contemnor’s willingness to [comply with the order].”³⁷¹

G. Credit for Social Security Payments

The court of appeals also decided the case of *Brown v. Brown*,³⁷² which held that a retroactive lump sum payment of Social Security Disability benefits received by the dependent child of a child support obligor could not be credited against that person’s child support arrearage.³⁷³ However, the supreme court granted transfer and the opinion of the court of appeals, pursuant to Indiana

366. *Id.* at 1104 (internal quotation marks omitted) (quoting *In re Marriage of Stariha*, 509 N.E.2d 1117, 1122 (Ind. Ct. App. 1987)).

367. *Id.*

368. *Id.* (internal citations omitted) (quoting Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575, 578 (1989)).

369. *Id.*

370. *Id.* at 1105 (quoting *Duemling v. Fort Wayne Cmty. Concerts, Inc.*, 188 N.E.2d 274, 276 (Ind. 1963)).

371. *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Moore v. Ferguson*, 680 N.E.2d 862, 865 (Ind. Ct. App. 1997)). On rehearing, the court added that on remand the trial court should determine if the father had the financial ability to comply with the support order. *Branum v. State*, 829 N.E.2d 622, 623 (Ind. Ct. App. 2005).

372. 823 N.E.2d 1224 (Ind. Ct. App.), *trans. granted*, 841 N.E.2d 183 (Ind. 2005).

373. *Id.* at 1226.

Appellate Rule 58, was vacated.³⁷⁴ At the time this survey was written, the supreme court had not issued a decision.

IV. PATERNITY

A. Disestablishment of Paternity

In *Sutton v. Boes*,³⁷⁵ the father and mother were killed and the child's maternal grandmother was granted temporary custody of the child.³⁷⁶ As the next friend of the child she filed a verified petition to disestablish paternity. She alleged that the father of the child was not the child's true biological father because the mother had been at least four months pregnant when the father and mother had begun dating and that the mother did not know the identity of the true biological father. The grandmother filed her request for DNA testing and the estate of the father filed a motion to dismiss the petition to disestablish paternity. The trial court granted the motion and grandmother appealed.

On appeal, the grandmother argued that Indiana Code section 31-14-5-2 allowed a child to file a paternity petition and thus it was error for the court to grant the motion to dismiss.³⁷⁷ In affirming the trial court, the court appeals noted that there was no provision in the Indiana Code which permitted an action to disestablish paternity.³⁷⁸ Because the child was born during the marriage of its parents, the husband was presumed to be the child's father.³⁷⁹

*In re Paternity of B.W.M.*³⁸⁰ also involved disestablishment of paternity, this time pursuant to a petition for modification of child support.³⁸¹ The trial court vacated the father's child support order because subsequent DNA testing showed that he was not the child's father. When the child sought to establish that another man, Bradley, was the child's father, the trial court also dismissed that action.³⁸² The trial court dismissed the action because at the time the paternity petition was brought, the child was nearly fourteen years of age and Bradley had been "foreclosed from the opportunity to ever have any meaningful contact with this child."³⁸³ This essentially left the child fatherless. The child appealed and the court of appeals reversed.³⁸⁴

374. *Brown*, 841 N.E.2d at 183.

375. 829 N.E.2d 157 (Ind. Ct. App. 2005).

376. *Id.* at 158.

377. *Id.* at 159.

378. *Id.*

379. *Id.* (citing IND. CODE § 31-14-7-1 (2005)).

380. 826 N.E.2d 706 (Ind. Ct. App.), *trans. denied sub nom.* Miller v. Bradley, 841 N.E.2d 179 (Ind. 2005).

381. *Id.* at 706-07.

382. *Id.* at 707.

383. *Id.*

384. *Id.* at 708.

The court noted that in *In re S.R.I.*³⁸⁵ the supreme court had observed that “there is a substantial public policy in correctly identifying parents”—both for the medical and psychological best interests of the child—and for the “just determination of child support” because “public policy disfavors a support order against a man who is not the child’s father.”³⁸⁶ However, the trial court in *B.W.M.* had, in effect, taken away the child’s legal father and left him powerless to establish the identity of his biological father. “This runs completely contrary to our established public policy of correctly identifying parents and their offspring.”³⁸⁷ The record revealed that the child wanted to know the identity of his father and though Bradley was a virtual stranger, the child wanted the opportunity to know his real father.³⁸⁸ In disapproving of the action in the court below, the court of appeals observed “[w]e are mindful of the fact that both our supreme court and this court have previously looked with displeasure on parents attacking their paternity through motions to modify child support orders under Indiana Trial Rule 60.”³⁸⁹ The matter was remanded to the trial court to give the “fatherless child . . . the chance to prove who his biological father [was].”³⁹⁰

B. Statute of Limitations/Necessary Parties

The case of *In re Paternity of K.L.O.*³⁹¹ determined the statute of limitations applicable to a paternity action and the parties necessary to a paternity action. The mother and Jeffery were dating at the time the child, K.L.O., was born in August 1992.³⁹² They executed a paternity affidavit naming Jeffery as the father. Approximately ten years later, another man, Toby Lakins, at the mother’s request, submitted to a DNA test which “revealed the probability of 99.99995% that Lakins was K.L.O.’s biological father.”³⁹³ The mother then filed a petition to establish paternity in Toby who answered by filing a motion to dismiss maintaining that the executed paternity affidavit had already established paternity in Jeffery and that Jeffery should have been joined in the paternity action as a necessary party. The trial court granted the motion.

Later, the mother filed a second petition to establish paternity alleging that Jeffery was K.L.O.’s father.³⁹⁴ But in doing so she failed to make Toby a party to the proceedings. Subsequent DNA testing revealed that Jeffery was not the

385. 602 N.E.2d 1014 (Ind. 1992).

386. *In re Paternity of B.W.M.*, 826 N.E.2d at 707 (citing *In re S.R.I.*, 602 N.E.2d at 1016).

387. *Id.* at 708.

388. *Id.*

389. *Id.* (citing *Ohning v. Driskill*, 739 N.E.2d 161, 164 (Ind. Ct. App. 2000); *Russell v. Russell*, 682 N.E.2d 513, 518 (Ind. 1997); *Gibson v. Gibson*, 644 N.E.2d 876, 877 (Ind. 1994); *Farrow v. Farrow*, 559 N.E.2d 597, 600 (Ind. 1990)).

390. *Id.*

391. 816 N.E.2d 906 (Ind. Ct. App. 2004).

392. *Id.* at 907.

393. *Id.*

394. *Id.*

biological father of K.L.O. The petition to establish paternity was dismissed.

Undeterred, the mother filed a third petition to establish paternity, again alleging that Toby was the father. Once again, Toby moved to dismiss contending that paternity had already been established in Jeffery pursuant to the paternity affidavit, that Jeffery was a necessary party, and that the paternity petition should be dismissed because Jeffrey had not been joined in the action. The trial court denied Toby's motion and he was granted certification of the trial court's denial for interlocutory appeal.

On appeal, Toby alleged that his motion to dismiss should have been granted because the statute of limitations barred the mother from pursuing a paternity action and because Jeffrey was not joined in the paternity action as a necessary party.³⁹⁵ In deciding the statute of limitations question, the court of appeals observed that Indiana Code section 31-14-5-3 prohibited a mother from filing a paternity petition later than two years after the child is born.³⁹⁶ Nevertheless, the court noted that Indiana Code section 31-14-5-2(b) allows a child to bring a paternity action at any time before the child reaches twenty years of age.³⁹⁷ Also, the court determined that Indiana Code section 31-14-5-2(a) allows an underage child to bring a paternity action by guardian ad litem or next friend.³⁹⁸ Because the paternity action was filed on behalf of K.L.O. by her mother as her next friend, the mother was not barred by the statute of limitations from filing a paternity petition on the child's behalf as her next friend.³⁹⁹

In addressing whether Toby's motion to dismiss should have been granted because Jeffrey was not joined as a necessary party, the court of appeals agreed with Toby.⁴⁰⁰ The court relied on the following: "Indiana Code § 31-14-5-6 provides, 'the *child*, the *child's mother*, and *each person alleged to be the father* are necessary parties to each [paternity] action.'"⁴⁰¹ Indiana Code section 31-14-7-3 provides that a man is a child's legal father if he has executed a paternity affidavit and that affidavit has not been set aside.⁴⁰² Because Jeffrey was K.L.O.'s father by operation of the paternity affidavit and that affidavit had not been set aside or rescinded pursuant to Indiana Code section 16-37-2-2.1(i), he was a necessary party to the paternity action against Toby and had to be joined in that action.⁴⁰³ The court reversed and remanded to the trial court.⁴⁰⁴

395. *Id.* at 908.

396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.* at 908-09.

401. *Id.* at 908 (emphasis added) (alteration in original).

402. *Id.*

403. *Id.*

404. *Id.* at 908-09.

C. Child's Name

*In re Paternity of J.C.*⁴⁰⁵ involved the issue of whether a trial court is required to determine if it is in the best interest of a non-marital child to change the child's surname.⁴⁰⁶ The mother filed a petition to determine paternity, and both parties were present at the hearing. At the hearing, the parties presented an agreement "with respect to child support, custody, visitation, insurance, and the child's name."⁴⁰⁷ Pursuant to that agreement, the child was to retain the mother's maiden name. The trial court entered an order which incorporated the parties' agreement. Following the paternity entry adopting the agreement of the parties, they returned to court several times for modification of various issues but never regarding the child's surname. Subsequently, the mother married and the father filed a motion for change of minor's name. The basis of the father's argument was that the mother's name was now different than the child's surname and that he had a "protectable interest in the child bearing his last name pursuant to common law and as a matter of statute."⁴⁰⁸ The trial court granted the father's motion and the mother appealed.

On appeal, the mother argued that not only should the father be required to show that changing the child's surname would be in the best interest of the child but he also had to show that there was a substantial change in circumstances since the initial determination.⁴⁰⁹ In reversing the trial court, the court noted that

[i]t is well settled in Indiana that a biological father seeking to obtain the name change of his nonmarital child bears the burden of persuading the court that the change is in the best interest of the child. Absent that evidence of the child's best interests, the father is not entitled to obtain a name change.⁴¹⁰

The court remanded the matter to the trial court advising the trial court to consider:

whether the child holds property under a given name, whether the child is identified by public and private entities and community members by a particular name, the degree of confusion likely to be occasioned by a name change and (if the child is of sufficient maturity) the child's desires.⁴¹¹

405. 819 N.E.2d 525 (Ind. Ct. App. 2004).

406. *Id.* at 527.

407. *Id.*

408. *Id.*

409. *Id.* at 528.

410. *Id.* at 527 (internal citations omitted). The court rejected the mother's "novel" argument that change of circumstances is also required citing a lack of authority. *Id.* at 528.

411. *Id.*

V. ADOPTION: ADOPTIONS BY SAME SEX PARTNERS⁴¹²

The case of *Mariga v. Flint*,⁴¹³ where the same sex partner had adopted the partner's biological children under Indiana's stepparent adoption statute,⁴¹⁴ called upon the court of appeals to "examine the nature of parenthood."⁴¹⁵ In the previous survey period, the court of appeals decided the case *In re Adoption of K.S.P.*,⁴¹⁶ which held that an adoption by a same sex partner under the Indiana stepparent adoption statute did not divest the parental rights of the biological parent.⁴¹⁷ In *K.S.P.*, the court of appeals reversed the trial court's conclusion that adoption by a same sex partner was not allowed by the Indiana Stepparent Adoption statute.⁴¹⁸ The court of appeals stated:

We conclude that where, as here, the prospective adoptive parent and the biological parent are both in fact acting as parents, Indiana law does not require a destructive choice between the two parents. Allowing continuation of the rights of both the biological and adoptive parent, where compelled by the best interests of the child, is the only rational result⁴¹⁹

In *Mariga*, the same sex couple had been involved in an intimate relationship since at least 1992.⁴²⁰ One of the partners had two children from a prior marriage that had ended in divorce. In 1996, the mother's partner, with the consent of the biological father, adopted the mother's children under Indiana's stepparent adoption statute. Two years later, the couple separated and both the children remained with the mother. The couple had an informal agreement regarding child support and the partner continued to exercise parenting time. Eventually, the child support payments from the partner stopped and the partner's parenting time with the children became increasingly sporadic.

The mother filed a petition to establish custody, visitation, and support.⁴²¹ In response, the partner filed a petition to vacate her original adoption of the children. The petition to vacate the adoption was denied and the partner was ordered to pay weekly child support and uninsured medical expenses pursuant to the "6% Rule."

412. The case of *In re A.B.*, 818 N.E.2d 126 (Ind. Ct. App. 2004) was also decided, but the Indiana Supreme Court granted transfer and vacated sub nom. *King v. S.B.*, 837 N.E.2d 965 (Ind. 2005).

413. 822 N.E.2d 620 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 191 (Ind. 2005).

414. IND. CODE § 31-19-15-2 (2005).

415. *Mariga*, 822 N.E.2d at 622.

416. 804 N.E.2d 1253 (Ind. Ct. App. 2004).

417. *Id.* at 1260. For a discussion of *Adoption of K.S.P.* and IND. CODE § 31-19-15-2, see Ruppert & Ruppert, *supra* note 305, at 1120.

418. *In re Adoption of K.S.P.*, 804 N.E.2d at 1260.

419. *Id.* (internal citation omitted).

420. *Mariga*, 822 N.E.2d at 624.

421. *Id.* at 624-25.

The partner appealed and the court of appeals affirmed the trial court, rejecting the argument that the adoption should have been vacated.⁴²² The court held that the partner had legally and properly become the parent of the children, and that her parental responsibilities could not be set aside simply because the underlying domestic partnership had dissolved.⁴²³

VI. COHABITATION/MARRIAGE: PROPERTY CLAIMS OF A NON-MARITAL PARTNER

The law in Indiana regarding the property claim of a non-marital partner is that “a party who cohabitates with another without subsequent marriage is entitled to relief upon a showing of an express contract or a viable equitable theory such as an implied contract or unjust enrichment.”⁴²⁴ During the survey period the court of appeals was asked to consider just such a claim in the case of *Fowler v. Perry*.⁴²⁵ In this case, the parties lived together in Missouri, and while in Missouri they had a child together.⁴²⁶ After sixteen months, the girlfriend moved to Indiana with the couple’s son while the boyfriend stayed in Missouri, to finish his education. During the period that the boyfriend stayed in Missouri, he gave his girlfriend control of approximately \$18,000 of his income with which, he believed, she was going to pay his individual bills and save the left over money so that the two could buy a house. She, on the other hand, believed that he wanted her to use the money to pay for the couple’s household expenses and to provide for the couple’s child. The boyfriend did not pay support separately and the girlfriend had always been responsible for paying the couple’s household expenses.⁴²⁷ The couple had also become engaged and the boyfriend had purchased an engagement ring he gave to the girlfriend. Ultimately, the girlfriend broke off the engagement and attempted to pawn the engagement ring. Before the ring could be pawned, it was stolen and she received insurance proceeds in the amount of \$5000.

The boyfriend brought an action against her for the amount of the money that he believed should have been placed in savings and for the value of the engagement ring. The trial court ruled against the boyfriend, finding that there was no evidence of an express or implied contract as to how the funds should have been distributed and found an absence of specific facts establishing that the engagement had been given in expressed contemplation of marriage.⁴²⁸ The boyfriend appealed.

On appeal, the boyfriend argued that the trial court committed error because his claim was one more appropriately classified as for unjust enrichment rather

422. *Id.* at 628.

423. *Id.*

424. *Bright v. Kuehl*, 650 N.E.2d 311, 315 (Ind. Ct. App. 1995).

425. 830 N.E.2d 97 (Ind. Ct. App. 2005).

426. *Id.* at 100.

427. *Id.*

428. *Id.* at 101.

than one for express or implied contract. The court of appeals rejected his contention, holding that the rule laid down in *Bright v. Kuehl*⁴²⁹ required the plaintiff to show an express contract or a viable equitable theory such as implied contract or unjust enrichment.⁴³⁰ With respect to unjust enrichment, the court stated:

To prevail on a claim for unjust enrichment, a plaintiff must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust. Principals of equity prohibit unjust enrichment of a party who accepts the unrequested benefits another provides despite having the opportunity to decline those benefits.⁴³¹

Because of the conflicting testimony, it was apparent that the parties did not have an express agreement,⁴³² and the trial court could have reasonably concluded, given the testimony and the parties' past history together, that all of the money had been used by the girlfriend to support the household, provide for the couple's son, and pay for the boyfriend's bills.⁴³³ Thus, it could not be said that she had been unjustly enriched.⁴³⁴

The boyfriend also argued that it was error for the court not to award him the purchase price of the engagement ring. The trial court had found that it had not been presented with any evidence of a proposal for marriage or other evidence that the ring had been given in contemplation of marriage—even though the parties, throughout their testimony, had identified the ring as “the engagement ring.”⁴³⁵ In analyzing the propriety of the trial court's ruling, the court of appeals first examined whether the ring constituted a gift in contemplation of marriage.⁴³⁶ Both parties had referred to the ring as an “engagement ring” and the court determined that “[A]n ‘engagement ring’ is defined as ‘a ring given in token of betrothal.’”⁴³⁷ The court stated, “[t]he term ‘betrothal’ refers to ‘a mutual promise or contract for a future marriage.’”⁴³⁸ Therefore, because the parties had referred to their ring as an engagement ring, the trial court had committed error when it found the evidence insufficient to prove that the ring was given in contemplation of marriage.⁴³⁹

The court next had to determine whether the boyfriend was entitled to the

429. 650 N.E.2d at 311.

430. *Fowler*, 830 N.E.2d at 103.

431. *Id.* (internal citation omitted).

432. *Id.* at 103-04. No written document was introduced into evidence regarding the parties' agreement.

433. *Id.* at 101.

434. *Id.* at 104.

435. *Id.*

436. *Id.*

437. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 751 (2002)).

438. *Id.*

439. *Id.*

return of the ring or its purchase price. The court noted that the question of whether of the engagement ring should be returned was one of first impression in Indiana.⁴⁴⁰ The court examined whether the ring was intended as an absolute or a conditional gift.⁴⁴¹ The court determined that in our society an engagement ring is the symbol token of a couple's agreement to marry.⁴⁴² Thus, in order for title to the ring to transfer and the gift to become absolute, the marriage must first occur.⁴⁴³ That is, "marriage is a condition precedent before ownership of an engagement ring vests in the donee."⁴⁴⁴ Therefore, in most circumstances, an engagement ring is a conditional gift.⁴⁴⁵

The court next had to determine the rightful ownership of an engagement ring when the condition of marriage is never satisfied.⁴⁴⁶ In analyzing the case law of other jurisdictions, the court determined that there is a majority and minority rule.⁴⁴⁷ The majority of jurisdiction have "adopted a 'fault based' approach, wherein the donor is entitled to the return of the engagement ring only if the engagement was broken by mutual agreement or unjustifiably by the donee."⁴⁴⁸ The minority of jurisdictions have adopted what the court of appeals termed "the modern trend" which holds that "once an engagement is broken, the engagement ring should be returned to the donor, regardless of fault."⁴⁴⁹ Thus, fault is irrelevant because the condition of marriage was never fulfilled, and ownership of the ring was never transferred.⁴⁵⁰

The court found this minority approach to be the better approach for two

440. *Id.* at 105 (citing *Linton v. Hasy*, 519 N.E.2d 161, 162 (Ind. Ct. App. 1988) for this proposition).

441. *Id.*

In addition to the competency of the donor, a valid inter vivos gift—i.e., an absolute gift—occurs when: (1) the donor intends to make a gift; (2) the gift is completed with nothing left undone; (3) the property is delivered by the donor and accepted by the donee; and, (4) the gift is immediate and absolute. *Shourek v. Stirling*, 652 N.E.2d 865, 867 (Ind. Ct. App. 1995). Thus, once the delivery and acceptance of the gift inter vivos occurs, the gift is irrevocable and a present title vests in the donee. *Hopping v. Wood*, 526 N.E.2d 1205, 1207 (Ind. Ct. App. 1988), *reh'g denied, trans. denied*. By contrast, a gift is conditional if it is conditioned upon the performance of some act by the donee or the occurrence of an event in the future.

Id.

442. *Id.*

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.*

448. *Id.* (citing *Heiman v. Parrish*, 942 P.2d 631, 635 (Kan. 1997)); see also Elaine Marie Tomko, Annotation, *Rights in Respect of Engagement and Courtship Presents when Marriage Does Not Ensur*, 44 A.L.R. 5TH 1 (2005).

449. *Fowler*, 830 N.E.2d at 106.

450. *Id.*

reasons.⁴⁵¹ First, the “no fault” approach was consistent with Indiana’s “no-fault” system of divorce.⁴⁵² Second, the court did not want the Indiana judiciary “to tackle the seemingly insurmountable task of determining which party was at fault for the termination of an engagement for marriage.”⁴⁵³ Having determined that the gift of the engagement ring was conditioned upon the parties’ marriage, and because that promise was not kept, regardless of fault, the ring had to be returned or the purchase price refunded.⁴⁵⁴

451. *Id.*

452. *Id.*; see IND. CODE § 31-15-1-2 (2005).

453. *Fowler*, 830 N.E.2d at 106.

454. *Id.*

In adopting the “no-fault” approach, however, we note that, in this modern era, it is not uncommon for both parties to contribute financially to the purchase of an engagement ring. Though not customary, it is also not atypical for the woman, i.e., the donee or the recipient, to purchase her own engagement ring. Armed with these realities, we hold that when an engagement ring is purchased in contemplation of marriage and such engagement does not result in marriage, the person who purchased the engagement ring is entitled to its return or, if return of the ring is impossible, to the monetary amount contributed toward the purchase of the ring.

SURVEY OF RECENT DEVELOPMENTS IN HEALTH LAW

ICE MILLER LLP*

INTRODUCTION

This survey summarizes recent developments in case law, legislation, and administrative actions that affect the health care industry. Not meant to be an exhaustive review, this survey details the “hot” topics in the health care industry this year.

I. MEDICARE PART D PRESCRIPTION DRUG BENEFIT

In 2003, Congress passed, and the President signed, the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (“MMA”), a principal purpose of which was to add a prescription drug benefit to the Medicare program.¹ In 2005, the Centers for Medicare and Medicaid Services (“CMS”) took a number of steps to implement the Part D drug benefit in anticipation of the January 1, 2006, commencement of the benefit. Most notably, on January 28, 2005, CMS issued a Final Rule implementing Part D.² The Final Rule is quite complex and the following is merely a summary highlighting some of its major provisions.

A. Overview of Part D Benefit and Sponsors

The Part D prescription drug benefit is not provided directly through CMS. Instead, CMS contracts with “Part D sponsors” to provide the benefit. Part D sponsors may include Prescription Drug Plan (“PDP”) sponsors, Medicare Advantage organizations that offer a Medicare Advantage Prescription Drug plan, a PACE organization offering a PACE plan, or a cost plan offering prescription drug coverage.³ The Final Rule sets forth a myriad of requirements

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1. Pub. L. 108-173, 117 Stat. 2066 (Dec. 8, 2003).

2. 70 Fed. Reg. 4194 (Jan. 28, 2005) (to be codified at 42 C.F.R. pts. 400, 403, 411, 417, and 423).

3. 42 C.F.R. § 423.4 (2005). A “PDP sponsor” is a nongovernmental entity that is certified by CMS as meeting the requirements and standards of the Part D regulations that apply to entities that offer prescription drug plans. *Id.* A PDP is prescription drug coverage that is offered under a policy, contract, or plan that has been approved as specified in the Part D regulations and that is offered by a PDP sponsor that has a contract with CMS that meets the requirements of the Part D regulations. *Id.* PACE stands for programs of all-inclusive care for the elderly. 42 C.F.R. § 460.6. A “cost plan” is a plan operated by a Health Maintenance Organization or a Competitive Medical Plan in accordance with a cost-reimbursement contract under section 1876(h) of the Social Security Act. 42 C.F.R. § 423.4. Part D coverage may also be provided through a “fallback” prescription

relating to an annual bid process for prescription drug plans approved by CMS, premium setting, risk retention, application procedures, requirements, and contracts between CMS and Part D plans.⁴ In general, a Part D plan applicant must: (1) complete an application; (2) be organized and licensed under State law as a risk bearing entity eligible to offer health insurance or health benefits coverage in each State in which it offers a Part D plan; (3) adhere to minimum enrollment requirements; (4) maintain administrative arrangements satisfactory to CMS related to management, personnel, bonding, insurance, and compliance; (5) not have non-renewed a contract with CMS within the past two years (subject to certain exceptions); (6) not have submitted a bid or offered a fallback prescription drug plan in accordance with specified rules; (7) agree to CMS audits to detect and prevent fraud and abuse; and (8) agree to certain severability conditions.⁵ The Final Rule amplifies these conditions by setting forth detailed provisions relating to the actual terms of contracts between CMS and Part D sponsors, which include details about termination and non-renewal of contracts.⁶

Part D provides coverage for most outpatient drugs that may be dispensed by a prescription for medically accepted indications, as well as insulin and medical supplies associated with the injection of insulin, including syringes, needles, alcohol swabs, and gauze.⁷ It also includes vaccines licensed under the Public Health Services Act and certain biological products. Part D does not cover drugs for which payment is available under Medicare Parts A or B, and a PDP or MA-PD plan may also exclude coverage if the drug was not prescribed in accordance with the plan or Part D (such as if the drug was not covered under the plan's formulary).⁸

Part D sponsors must provide either "standard prescription drug coverage" or "alternative prescription drug coverage."⁹ Standard prescription drug coverage has an annual deductible for enrollees of \$250. After an enrollee meets the deductible, the enrollee's prescription drug costs between \$250 and \$2250 (the "initial coverage limit") are subject to a coinsurance payment by the enrollee

drug plan. 42 C.F.R. §§ 423.851 to -.875. Fallback drug plans are those that offer standard or alternative coverage, provide access to negotiated prices, and meet the other requirements for prescription drug plans. CMS, however, has the authority to waive requirements of the Final Rule for fallback prescription drug plans if it is necessary to ensure that each enrollee has the choice of at least two prescription drug plans in the area in which the enrollee resides. However, due to the strong participation of private prescription drug plans in all areas, the fallback provisions are not currently necessary.

4. 42 C.F.R. §§ 423.251 and 423.500 to -.516.

5. 42 C.F.R. § 423.504; *see also* 42 C.F.R. §§ 423.401 to -.440 (setting forth the general requirements for prescription drug plan sponsors and rules related to waiving requirements); 42 C.F.R. §§ 423.641 to -.669 (setting forth the procedures for contract determination, contract non-renewal, and contract termination).

6. 42 C.F.R. §§ 423.505 to -.516.

7. 42 C.F.R. § 423.100.

8. *Id.*

9. 42 C.F.R. § 423.104(d)-(e).

equal to twenty-five percent of the actual cost of the prescription drugs. When an enrollee's actual drug costs exceed \$2250, the enrollee is responsible for paying one hundred percent of actual drug costs up to \$3600 (the "annual out-of-pocket threshold"). After an enrollee's actual incurred drug costs exceed the annual out-of-pocket threshold, Part D's "catastrophic" drug benefit will engage under which the enrollee will be responsible for relatively small cost-sharing requirements. The catastrophic cost-sharing requirements are equal to the greater of: (1) \$2 for a generic drug or preferred drug that is a multiple source drug or \$5 for any other drug; or (2) five percent of the actual drug cost.¹⁰

Part D's catastrophic benefit will not commence until the enrollee has actually "incurred" \$3600 in actual drug costs. For these purposes, "incurred costs" are costs that are not paid for under the Part D plan as a result of the application of any annual deductible or other cost-sharing rules and that are paid for by the enrollee (or on behalf of the enrollee by another person). These are the enrollee's "true out-of-pocket" costs, or "TrOOP." TrOOP costs may not include any reimbursement to the enrollee through insurance, a group health plan, or other third party payment arrangement, or any payment by another person on behalf of the enrollee who is paying under insurance, a group health plan, or a third party payment arrangement.¹¹ In other words, with few exceptions, the enrollee must actually have personally paid \$3600 in drug costs before the catastrophic coverage commences. Therefore, any amounts paid by an employer-provided prescription drug benefit or other insurance will not count toward the achievement of the \$3600 threshold.¹²

"Basic Alternative prescription drug coverage" is prescription drug coverage that is actuarially equivalent to the standard prescription drug benefit. However, the basic alternative coverage may not have an annual deductible that exceeds the deductible under standard coverage (\$250 in 2006) and must have the same

10. *Id.* § 423.104(d). Note that the deductible, initial coverage limit, and annual out-of-pocket threshold set forth above are for 2006 and are all subject to an annual percentage increase for each year that is equal to the annual percentage increase in average per capita aggregate expenditures for Part D drugs in the United States for Part D eligible individuals. The calculation is based on data for the twelve-month period ending in July of the previous year. *Id.* § 423.104(d)(5)(iv). In addition, the Final Rule provides for premium and cost-sharing subsidies for individuals who meet certain low-income thresholds. 42 C.F.R. §§ 423.771 to -.800. The Social Security Administration published a final rule implementing the low-income drug subsidy on December 30, 2005. Medicare Part D Subsidies, 70 Fed. Reg. 77,664 (Dec. 30, 2005) (to be codified at 20 C.F.R. pt. 418). Among other things, the final rule details subsidy amounts, eligibility, and the subsidy application process.

11. 42 C.F.R. § 423.100.

12. Note that an enrollee may still count as "incurred" costs that are reimbursed through an employer-sponsored flexible spending account, a health savings account, or a medical savings account because these vehicles are generally funded with an enrollee's own funds. Medicare Program; Medicare Prescription Drug Benefit, 70 Fed. Reg. 4194, 4241-42 (Jan. 28, 2005) (to be codified at 42 C.F.R. pts. 400, 403, 411, 417, and 423).

threshold for catastrophic coverage (\$3600 for 2006).¹³ If the basic alternative prescription drug coverage meets these requirements, it may deviate from the standard benefit by, for example, changing the cost sharing structure, implementing different formularies, and modifying benefit limits.

In addition, PDP and MA-PD plans that offer a standard or basic alternative plan may also offer enhanced alternative coverage to their own enrollees that covers drugs that are excluded from the Part D program or that increases the actuarial value of the Part D coverage such as reducing the deductible, cost-sharing, or initial coverage limit.¹⁴ Enhanced alternative coverage may only be offered by a PDP sponsor if the sponsor also offers standard or basic alternative coverage in the service area where it is offering the enhanced alternative coverage.¹⁵

For both standard and alternative prescription drug coverage, Part D sponsors are required to provide Part D enrollees access to their negotiated prices.¹⁶ "Negotiated prices" are prices for covered Part D drugs that are available to beneficiaries at the point of sale at network pharmacies and that are reduced by those discounts, direct or indirect subsidies, rebates, other price concessions, and direct or indirect remunerations that the Part D sponsor has elected to pass through to Part D enrollees at the point of sale (including any dispensing fees).¹⁷ These negotiated prices must be made available to all enrollees regardless of their applicable deductible, initial coverage limit, out-of-pocket threshold, or amounts in excess of this threshold.¹⁸ Part D plan sponsors must disclose to CMS data related to their negotiated price concessions.¹⁹

B. Eligible Individuals and Enrollment

An individual is eligible to enroll in Part D if he or she is entitled to Medicare benefits under Part A or enrolled in Medicare Part B and lives in the service area of a Part D plan.²⁰ If an individual is covered under an MA-PD that offers prescription drug coverage, that individual must obtain their prescription drug coverage through the MA-PD plan and may not receive the coverage through another prescription drug plan.²¹ Eligible individuals may begin enrolling in Part D during their "initial enrollment period."²² An individual who is first eligible to enroll in a Part D plan on or prior to January 31, 2006 has an initial enrollment period from November 15, 2005 through May 15, 2006. An

13. 42 C.F.R. § 423.104(e) (2005).

14. *Id.* § 423.104(f).

15. *Id.* § 423.104(f)(2).

16. *Id.* § 423.104(g).

17. 42 C.F.R. § 423.100.

18. 42 C.F.R. § 423.104(g).

19. *Id.*

20. 42 C.F.R. § 423.30(a).

21. *Id.* § 423.30(b).

22. 42 C.F.R. § 423.38(a).

individual who is first eligible to enroll in a Part D plan in February 2006 has an initial enrollment period from November 15, 2005 through May 31, 2006. An individual who first becomes eligible for Part D in March 2006 or thereafter has the same initial enrollment period as he does under Medicare Part B.²³ Each year, there will be an “annual coordinated election period” during which eligible individuals may enroll in Part D or change their Part D prescription drug plan choices for the following calendar year. That period is from November 15 to December 31 of each year.²⁴ In addition, an otherwise eligible individual may also enroll or disenroll during mid-year “special enrollment periods” such as when the individual loses other creditable prescription drug coverage, the individual mistakenly enrolled or disenrolled because of misinformation from other prescription drug plans or a Federal employee, or the individual moves out of a region covered by the prescription drug plan in which he or she is enrolled.²⁵

If the individual fails to apply for Part D by the end of his or her initial enrollment period for Part D and does not have other prescription drug coverage that is “creditable coverage” for any continuous 63 day period or longer, he or she may be subject to a late penalty paid through increased Part D premiums.²⁶ The higher premium is based on the number of months the individual does not have creditable coverage. The premium is increased by one percent for each

23. *Id.* § 423.38(a)(1)-(3).

24. *Id.* § 423.38(b).

25. *Id.* § 423.38(c).

26. 42 C.F.R. § 423.46. Prescription drug coverage is “creditable coverage” for these purposes if the actuarial value of the plan coverage equals or exceeds the actuarial value of Part D Medicare standard prescription drug coverage. The actuarial value of a plan’s prescription drug benefit is determined through the use of generally accepted actuarial principals and in accordance with CMS actuarial guidelines (and generally looks to expected amount of paid claims). 42 C.F.R. § 423.56(a). The basic actuarial equivalence value test is performed by determining whether the expected plan payout on average is equivalent to or exceeds the expected plan payout of Medicare Part D. This generally means that the prescription drug plan’s expected amount of paid claims is at least as much as the expected amount of paid claims under the standard Medicare prescription drug benefit. *Id.* § 423.56. Prescription drug plans that meet the following requirements are deemed to be “creditable coverage” without further need for actuarial analysis: (1) the plan provides coverage for brand and generic prescriptions; (2) the plan provides reasonable access to retail providers and, optionally, for mail order coverage; (3) the plan is designed to pay on average at least sixty percent of participants’ prescription drug expenses; and (4) the plan (i) has no annual benefit maximum or a maximum annual benefit payable by the plan of at least \$25,000 or (ii) has an actuarial expectation that the amount payable by the plan will be at least \$2000 per Medicare eligible individual in 2006. If a plan has integrated health coverage, the integrated health plan has no more than a \$250 deductible per year, has no annual benefit maximum or a maximum annual benefit payable by the plan of at least \$25,000, and has no less than a \$1 million lifetime combined benefit maximum. *See* CMS, Creditable Coverage Guidance (Jan. 4, 2006), <http://www.cms.hhs.gov/CreditableCoverage/Downloads/CCGuidance.pdf>; CMS, Creditable Coverage Simplified Determination, <http://www.cms.hhs.gov/CreditableCoverage/Downloads/CCSimplifiedDetermination.pdf> (last visited July 2, 2006) (clarifying the “Creditable Coverage Guidance”).

month without creditable coverage.²⁷ This increased premium will apply for as long as the person remains enrolled in Part D and the higher premium will increase each year because the increase will be applied to each subsequent year's base premium. If the individual does have creditable coverage and fails to enroll in Medicare Part D when he or she is initially eligible, the individual will not be penalized. However, if the individual loses creditable coverage and experiences a continuous period of sixty-three days or longer without creditable coverage, the individual will be subject to the higher premium for late enrollment commencing with the month his creditable coverage is no longer in effect.

In order for individuals to know whether they may safely waive Part D coverage during their initial enrollment period without incurring the late penalty, entities that offer certain types of prescription drug coverage to Part D eligible individuals must provide written notice to those individuals about whether their coverage is "creditable coverage."²⁸ Among the most common entities that must provide this disclosure are those that sponsor employer and union group health plans, Medigap policies, military coverage, and individual health insurance coverage.²⁹ CMS has issued model notices that may be provided to Part D eligible individuals to notify them whether an entity's prescription drug coverage is "creditable" or "non-creditable."³⁰ The notice must be provided to any Part D eligible individual who is enrolled or is seeking enrollment in the entity's prescription drug coverage. It is permitted to be distributed with other materials sent to the eligible individual (e.g., an employer plan's summary plan description or enrollment and/or renewal materials) or as a separate document. A single notice can be provided to the covered Part D eligible individual and all Part D eligible dependents covered under the entity's prescription drug plan. However, a separate notice must be sent if the entity knows that the spouse and/or dependent who are Part D eligible individuals do not live at the same address as the covered participant. Notices must be provided at a minimum at the following times: (1) prior to an individual's initial enrollment period for Part D; (2) prior to the commencement of the annual coordinated election period that begins on November 15 of each year; (3) prior to the effective date of a Part D eligible individual's enrollment in the entity's prescription drug coverage; (4) when the prescription drug coverage ends or changes so that it is no longer creditable coverage; and (5) upon request by the individual.³¹ Specified entities must also

27. 42 C.F.R. § 423.286(d)(3).

28. 42 C.F.R. § 423.56(c)-(d).

29. *Id.* § 423.56(b).

30. The model notices are available at CMS, Creditable Coverage Overview, http://www.cms.hhs.gov/CreditableCoverage/01_Overview.asp (last visited July 2, 2006); *see also* Creditable Coverage Guidance (Jan. 4, 2006), <http://www.cms.hhs.gov/CreditableCoverage/Downloads/CCGuidance.pdf>; CMS, Creditable Coverage Simplified Determination, <http://www.cms.hhs.gov/CreditableCoverage/Downloads/CCSimplifiedDetermination.pdf> (last visited July 2, 2006) (clarifying the "Creditable Coverage Guidance").

31. CMS, Creditable Coverage Overview, http://www.cms.hhs.gov/CreditableCoverage/01_Overview.asp (last visited July 2, 2006).

provide notice to CMS of whether their prescription drug coverage is creditable through an on-line disclosure form.³²

In general, the effective date of coverage for a newly enrolled individual is the first day of the month that the individual is entitled to Part A or enrolled in Part B, if the Part D enrollment is made *before* the person is entitled to Part A or enrolled in Part B. If Part D enrollment is made *after* that time, then coverage is generally effective on the first day of the month after the Part D enrollment is made.³³ Enrollment made during an annual coordinated election period is effective as of the first day of the next calendar year; however, enrollments made from January 1, 2006, through May 15, 2006, are effective as of the first day of the calendar month following the month in which the Part D enrollment is made.³⁴

C. Access to Pharmacies and Drugs

Part D plans are subject to a number of requirements to ensure that enrollees have adequate access to the drugs they need and pharmacies at which they may obtain the drugs. In general, a Part D plan must establish a network of retail pharmacies sufficient to ensure that ninety percent of enrollees in an urban area served by the Part D plan live within two miles of a network pharmacy, ninety percent of enrollees in a suburban area live within five miles of a network pharmacy, and seventy percent of enrollees in rural areas live within fifteen miles of a network pharmacy.³⁵ Other regulations require adequate access to non-retail pharmacies (e.g., mail-order and institutional pharmacies); home infusion pharmacies; long-term care pharmacies; and pharmacies operated by the Indian Health Service, an Indian tribe or tribal organization, or an urban Indian organization.³⁶ Part D plans must also allow enrollees to obtain any benefit offered under the plan at a retail pharmacy—although the Part D plan may charge higher cost-sharing at the retail pharmacy.³⁷ This requirement is most significant when an enrollee wants to obtain a ninety-day supply of a drug. In many non-Part D prescription drug plans (such as an employer group health plan), ninety-day drug supplies are only available through a mail-order pharmacy. Part D plans are required to offer these extended supplies through retail outlets also—although the plan may charge more if the prescription is filled at a retail outlet.³⁸ Plans must also ensure access to Part D drugs at out-of-network pharmacies when an enrollee cannot reasonably be expected to obtain such drugs at a network pharmacy and the enrollee does not access Part D drugs at an out-of-

32. See CMS, Disclosure to CMS Guidance (Jan. 10, 2006), <http://www.cms.hhs.gov/CreditableCoverage/Downloads/Disclosure2CMSGdnc.pdf>.

33. 42 C.F.R. § 423.40(a) (2005).

34. *Id.* § 423.40(b).

35. 42 C.F.R. § 423.120(a)(1)(i)-(iii).

36. *Id.* § 423.120(a)(3)-(6).

37. *Id.* § 423.120(a)(10).

38. *Id.*

network pharmacy on a routine basis (including access to vaccines through a physician's office).³⁹ A plan may require the enrollee to assume a greater financial responsibility for drugs obtained at an out-of-network pharmacy.⁴⁰

Part D plans may also create formularies (selected drugs that are exclusively covered by the plan or that are offered at a lower cost or cost-sharing requirement); however, CMS's Final Rule provides limits on a Part D plan's discretion to limit drugs in the formulary.⁴¹ Formularies may only be developed and revised by a Part D plan's pharmacy and therapeutic committee—the membership of which is prescribed by the Final Rule.⁴² A plan's formulary must include, within each therapeutic category and class of Part D drugs, at least two Part D drugs that are not therapeutically equivalent and bioequivalent, with different strengths and dosage forms available for each of those drugs.⁴³ However, only one Part D drug needs to be included if the particular category or class includes only one Part D drug. In addition, only one Part D drug needs to be included for a particular category or class if the Part D plan can demonstrate (and CMS concurs) that only two drugs are available in that category or class and that one drug is clinically superior to the other drug.⁴⁴ Finally, a Part D plan must include adequate coverage of the types of drugs most commonly needed by Part D enrollees, as recognized in national treatment guidelines.⁴⁵

A Part D plan may not remove a drug from the formulary without providing notice to CMS and other relevant entities sixty days prior to the removal.⁴⁶ In addition, the Part D plan must either: (1) provide direct written notice to affected enrollees at least sixty days before the effective date of the change or (2) provide the affected enrollee with a sixty-day supply of the drug the next time that the enrollee requests a refill and provide the enrollee with the removal notice at that time.⁴⁷ The regulation sets forth the content requirements of enrollee notices.⁴⁸ Drugs may be removed from the formulary immediately if deemed unsafe by the Food and Drug Administration, as long as retrospective notice is provided to affected enrollees, CMS, and other relevant entities.⁴⁹ Except for changes required by the FDA, no changes may be made during the period between November 15 and sixty days after the beginning of the new plan year.⁵⁰

The Part D Final Rule also requires that information be provided to enrollees and that enrollees' information remain confidential. A Part D sponsor must

39. 42 C.F.R. § 423.124.

40. *Id.*

41. 42 C.F.R. § 423.120(b).

42. *Id.* § 423.120(b)(1).

43. *Id.* § 423.120(b)(2)(i).

44. *Id.* § 423.120(b)(2)(ii).

45. *Id.* § 423.120(b)(2)(iii).

46. *Id.* § 423.120(b)(5)(i).

47. *Id.*

48. *Id.* § 423.120(b)(5)(ii).

49. *Id.* § 423.120(b)(5)(iii).

50. *Id.* § 423.120(b)(6).

provide enrollees with information about the plan's service area, benefits, cost-sharing, formulary list, procedures to request formulary exceptions, access, out-of-network coverage, grievance and appeals procedures, quality assurance policies, and other information.⁵¹ Pharmacies are required to inform enrollees of the price differential between a brand name Part D drug and its generic equivalent. The notice must be provided at the point of sale when the drug is dispensed (or at the time of the delivery of a mail-order drug).⁵² Finally, the regulations require PDP sponsors to ensure that they abide by all applicable medical privacy laws and have procedures that specify for what purposes information will be used within the organization and when it may be disclosed outside of the organization. Enrollee records must be maintained in an accurate and timely manner and enrollees must have timely access to the records and information that pertain to them.⁵³

D. Cost and Quality Control

The Final Rule requires Part D plans to institute certain cost control and quality improvement initiatives. Specifically, Part D plans must institute drug utilization management programs, quality assurance measures, and a medication therapy management program that targets medication use by individuals with chronic diseases who are likely to incur substantial annual drug costs due to use of multiple Part D drugs.⁵⁴ Part D sponsors are required to support and comply with electronic prescription standards relating to covered Part D drugs for Part D enrollees based on standards published by CMS on November 7, 2005.⁵⁵ Plan D sponsors may be deemed to comply with a number of the requirements of the Final Rule if they are accredited by a private, national accreditation organization approved by CMS.⁵⁶ The requirements for which deemed status can be obtained are the following: those relating to access to covered drugs, drug utilization management programs, quality assurance measurements and systems, medication therapy management programs, programs to control fraud, abuse, and waste, and privacy requirements.⁵⁷ CMS may remove deemed status if it determines the sponsor does not actually meet the requirements.⁵⁸ Deemed entities must submit

51. 42 C.F.R. § 423.128; *see also* 42 C.F.R. §§ 423.560 to -.638 (setting forth detailed provisions related to the grievance, coverage determination, and appeals processes required to be implemented by Part D plan sponsors).

52. 42 C.F.R. § 423.132. Note that certain waiver provisions may apply to this notice requirement. *Id.*

53. 42 C.F.R. § 423.136.

54. 42 C.F.R. § 423.153.

55. 42 C.F.R. § 423.159; *see also* Medicare Program; E-Prescribing and the Prescription Drug Program, 70 Fed. Reg. 67,568 (Nov. 7, 2005) (to be codified at 42 C.F.R. pt. 423).

56. 42 C.F.R. § 423.165 (2005). The standards and procedures for applying for approval to become a recognized accreditation organization are at 42 C.F.R. §§ 423.168 and 423.171.

57. 42 C.F.R. § 423.165(b).

58. *Id.* § 423.165(e).

to CMS their accreditation surveys and authorize the accreditation organization to release survey information to CMS (including the Part D sponsor's corrective action plans).⁵⁹

E. Compensation to Part D Plans

Part D plans are compensated for providing the Part D benefits and incurring the risk of providing those benefits through a number of mechanisms. Subpart G of the Final Rule "sets forth rules for the calculation and payment of CMS direct and reinsurance subsidies for Part D plans; the application of risk corridors and risk-sharing adjustments to payments; and retroactive adjustments and reconciliations to actual enrollment and interim payments."⁶⁰ Payments to sponsors are made from CMS's Medicare Prescription Drug Account.⁶¹ CMS provides Part D plans "advance monthly payments equal to the Part D plan's standardized bid, risk adjusted for health status," minus the monthly enrollee premiums.⁶² It also provides reinsurance subsidies on a monthly basis "based on either estimated or incurred allowable reinsurance costs . . . and final reconciliation to actual allowable reinsurance costs."⁶³ CMS provides "payments for premium and cost sharing subsidies, including additional coverage above the initial coverage limit, on behalf of certain [low-income] individuals."⁶⁴ Lump sum or monthly adjustments may be made "based on the relationship of the Part D plan's adjusted allowable risk corridor costs to predetermined risk corridor thresholds in the coverage year."⁶⁵ Finally, each year "CMS reconciles payment year disbursements with updated enrollment and health status data, actual low-income cost-sharing costs," and actual allowable reinsurance costs and may make retroactive adjustments if necessary.⁶⁶ The Final Rule details the calculation of all of the foregoing payments and prevents any State or local governmental authorities from imposing any premium tax, fee, or other similar assessment on these payments.⁶⁷ Any payment to a Part D sponsor is conditioned upon the sponsor providing information to CMS that is necessary to determine payment or that is required by law.⁶⁸ The Final Rule provides a payment appeals process for reconsideration of "reconciled health status risk adjustments of the direct

59. *Id.* § 423.165(d).

60. 42 C.F.R. § 423.301.

61. 42 C.F.R. § 423.315(a).

62. *Id.* § 423.315(b).

63. *Id.* § 423.315(c).

64. *Id.* § 423.315(d).

65. *Id.* § 423.315(e).

66. *Id.* § 423.315(f).

67. *See* 42 C.F.R. § 423.329 (referring to monthly payments, reinsurance subsidies, and low-income subsidies); 42 C.F.R. § 423.336 (referring to risk-sharing arrangements); 42 C.F.R. § 423.343 (referring to annual retroactive adjustments and reconciliations); *see also* 42 C.F.R. § 423.440(b) (referring to prohibition of state imposition of premium taxes).

68. 42 C.F.R. § 423.322; 42 C.F.R. § 423.159.

subsidy, . . . reconciled reinsurance payments, . . . reconciled final payments made for low-income cost sharing subsidies . . . and [final risk-sharing payments].”⁶⁹

F. Sanctions

CMS may impose defined intermediate sanctions for certain violations committed by Part D sponsors.⁷⁰ The following violations may result in sanctions:

(1) fail[ing] substantially to provide, to a Part D plan enrollee, medically necessary services that the organization is required to provide (under law or . . . contract) to a Part D plan enrollee [when] that failure adversely affects (or is substantially likely to adversely affect) the enrollee[;] (2) impos[ing] on Part D plan enrollees premiums in excess of the monthly basic and supplemental beneficiary premiums permitted [by the Social Security Act and the Final Rule;] (3) act[ing] to expel or refus[ing] to reenroll a beneficiary in violation of the [Final Rule;] (4) engag[ing] in any practice that may reasonably be expected to have the effect of denying or discouraging enrollment of individuals whose medical condition or history indicates a need for substantial future medical services[;] (5) misrepresent[ing] or falsify[ing] information furnishe[d to CMS or an] individual or . . . other entity under the Part D drug benefit program[; or] (6) employ[ing] or contract[ing] with an individual or entity who is excluded from participation in Medicare . . . for the provision of . . . [h]ealth care[, u]tilization review[, m]edical social work[, or a]dministrative services.⁷¹

Sanctions for violations may be imposed only after observing detailed procedures set forth in the Final Rule, and the sanctions may include one or more of the following:

(1) [c]ivil money penalties ranging from \$10,000 to \$100,000 depending upon the violation[;] (2) [s]uspension of enrollment of Medicare beneficiaries[;] (3) [s]uspension of payment to the Part D sponsor for Medicare beneficiaries who enroll[; or] (4) [s]uspension of all Part D plan marketing activities to Medicare beneficiaries for the Part D plan subject to the intermediate sanctions.⁷²

The sanctions may remain in place “until CMS is satisfied that the deficiency on

69. 42 C.F.R. § 423.350(a). The remainder of 42 C.F.R. § 423.350 provides detailed information regarding the reconsideration process, including the content of a request for reconsideration, an informal written reconsideration process, a hearing right, and a review by the CMS Administrator. *See id.* § 423.350(b)-(d).

70. 42 C.F.R. § 423.752(a).

71. *Id.*

72. 42 C.F.R. § 423.750(a)(1)-(4).

which the determination was based is corrected and is not likely to recur.”⁷³

G. Retiree Prescription Drug Plan Subsidy

Recognizing that the implementation of the Part D benefit might encourage employers to terminate their retiree prescription drug plans, the Final Rule allows for the payment of a subsidy to employment-based retiree health plans that provide “qualifying covered retirees” with prescription drug coverage that is “actuarially equivalent” to the standard Part D drug benefit.⁷⁴ A “qualifying covered retiree” is a Part D eligible individual who is a participant (or the spouse or dependent of the participant) in the employment-based retiree health plan that provides “actuarially equivalent” prescription drug benefits who is not enrolled in a Part D plan.⁷⁵ These plan sponsors may *not* collect a subsidy for retirees who enroll in Part D (regardless of whether the retiree also participates in the retiree plan).⁷⁶ For each “qualifying covered retiree” the sponsor of the retiree plan is eligible for a subsidy in the amount of twenty-eight percent of the allowable retiree cost for covered Part D drugs in the plan year for such retiree attributable to the gross retiree costs between the cost threshold (\$250 in 2006) and the cost limit (\$5000 in 2006).⁷⁷ Drug costs for qualifying covered retirees incurred by the retiree plan below \$250 and above \$5000 are not considered when calculating the twenty-eight percent subsidy.⁷⁸

To receive the subsidy, the employment-based retiree drug plan must provide prescription drug coverage that is “actuarially equivalent” to the standard Part D prescription drug benefit.⁷⁹ In general, actuarial equivalence is a measure of whether the retiree drug plan provides benefits that are on average for all participants at least as valuable as the standard Part D drug benefit.⁸⁰ Actuarial

73. *Id.* § 423.750(b).

74. 42 C.F.R. §§ 423.880 to -.894.

75. 42 C.F.R. § 423.882.

76. *Id.*

77. 42 C.F.R. § 423.886.

[G]ross retiree costs means, for a qualifying covered retiree who is enrolled in a qualified retiree prescription drug plan, . . . non-administrative costs incurred under the plan for Part D drugs during the year, whether paid for by the plan or the retiree, including costs directly related to the dispensing of Part D drugs.

42 C.F.R. § 423.882. The cost threshold and cost limits are adjusted annually in the same manner as the annual Part D deductible and the annual Part D out-of-pocket threshold are adjusted annually.

42 C.F.R. § 423.886(b)(3); *see also supra* note 10.

78. 42 C.F.R. § 423.886(b)(1)-(2).

79. 42 C.F.R. § 423.884(d).

80. Actuarial equivalence is achieved if the retiree plan’s “gross value” and “net value” are “at least equal to the actuarial” gross and net values of the standard Part D drug benefit. *Id.* § 423.884(d)(1)-(2). Gross value under the retiree plan “is determined using the actual claims experience and demographic data for Part D eligible individuals who are participants and beneficiaries in the [retiree] plan.” *Id.* § 423.884(d)(5)(ii)(A). Net value under the retiree plan is

equivalence must be certified “by a qualified actuary who is a member of the American Academy of Actuaries” and submitted through an on-line subsidy application process “no later than ninety days prior to the beginning of the plan year” to which the subsidy will apply.⁸¹ Applicants for the retiree drug subsidy must provide ongoing updates on the participation of qualified covered retirees⁸² and may receive subsidy payments on a monthly, quarterly, or annual basis.⁸³

II. FRAUD AND ABUSE

A. Gainsharing

The debate over hospital-physician gainsharing arrangements revived in 2005.⁸⁴ Gainsharing had fallen into disuse following an unequivocally negative 1999 Special Advisory Bulletin of the Department of Health and Human Services (“HHS”) Office of Inspector General (“OIG”).⁸⁵ In the Bulletin, OIG warned that then-current gainsharing practices violated the Civil Monetary Penalties (“CMP”) statute⁸⁶ which prohibits any “payment, directly or indirectly, to a physician as an inducement to reduce or limit services” to Medicare or Medicaid beneficiaries who are under the direct care of the physician.⁸⁷ OIG also warned that gainsharing arrangements violated the Anti-Kickback statute⁸⁸ which prohibits remuneration in return for patient referrals.⁸⁹

“determined by reducing the gross value of the coverage by the expected premiums paid by Part D eligible individuals who are plan participants or their spouses and dependents.” *Id.* § 423.884(d)(5)(ii)(B).

81. *Id.* §§ 423.884(c)(5), (d)(2). Applications for the retiree drug subsidy may be made at CMS, Retiree Drug Subsidy Program, at <http://rds.cms.hhs.gov/> (last visited July 2, 2006).

82. *Id.* § 423.884(c)(6).

83. 42 C.F.R. § 423.888(b)(1).

84. “While there is no fixed definition of a ‘gainsharing’ arrangement, the term typically refers to an arrangement in which a hospital gives physicians a percentage share of any reduction in the hospital’s costs for patient care attributable in part to the physicians’ efforts.” Department of Health and Human Services, Office of Inspector General, Special Advisory Bulletin: Gainsharing Arrangements and CMPs for Hospital Payments to Physicians to Reduce or Limit Services to Beneficiaries (July 1999), available at <http://oig.hhs.gov/fraud/docs/alertsandbulletins/gainsh.htm>.

85. *Id.*

86. *Id.*; 42 U.S.C. § 1320a-7a (2000).

87. 42 U.S.C. § 1320a-7a(b)(1).

88. See sources cited *supra* note 84; 42 U.S.C. § 1320a-7b.

89. 42 U.S.C. § 1320a-7b(b)(1)(A). Gainsharing arrangements also potentially implicate the Stark law prohibition on self referrals. 42 U.S.C. § 1395nn. OIG expressed no opinion on this issue, because the law fell outside its advisory opinion authority. See, e.g., Op. Dep’t of Health & Human Servs., OIG No. 05-01, 6-7 (Jan. 28, 2005) [hereinafter Advisory Opinion No. 05-01], available at <http://oig.hhs.gov/fraud/docs/advisoryopinions/2005/ao0501.pdf>. Similarly, OIG expressed no opinion on the application of the Internal Revenue Service’s regulations governing private inurement and private benefit issues for nonprofit hospitals. *Id.* at 7 n.8; see 26 U.S.C. §

Current gainsharing issues arise most frequently in surgical settings. Examples include policies which reward the substitution of less costly surgical items or the opening of sterile supplies only on an “as-needed” basis. A January 18, 2001, advisory opinion, in which OIG declined to take enforcement action against a surgical cost-saving arrangement, attracted little attention at the time.⁹⁰

Beginning on January 28, 2005, OIG issued six advisory opinions concerning various gainsharing proposals. The approved arrangements included policies which rewarded “practices to curb the inappropriate use or waste of medical supplies” in cardiac surgery,⁹¹ and the use of standardized supplies in cardiac catheterization laboratories.⁹² The advisory opinions concluded that each proposed arrangement constituted a potential violation of the CMP law and the Anti-Kickback statute. However, since the proposals contained safeguards to minimize the potential for abuse, OIG announced that it would not impose sanctions against the requester of the opinion.⁹³

With respect to the CMP law, OIG identified eight factors militating against sanctions.⁹⁴ First, each proposed arrangement clearly and separately identified the specific cost saving action to be implemented and the resulting savings.⁹⁵ This “allow[ed] for public scrutiny and . . . physician accountability for any adverse effects.”⁹⁶ Second, the requesters provided “credible medical support for the position that implementation of the recommendations [would] not adversely affect patient care.”⁹⁷ Third, the proposed incentive payments were for services “not disproportionately performed on . . . program beneficiaries [and were] calculated [based] on the hospital’s actual out-of-pocket . . . costs.”⁹⁸ Fourth, the proposals used objective data to establish the historical frequency of the

501(c)(3), Rev. Rul. 69-383, 1969-2 C.B. 113.

90. Op. Dep’t of Health & Human Servs., OIG No. 01-01 (Jan. 11, 2001), *available at* <http://oig.hhs.gov/fraud/docs/advisoryopinions/2001/ao01-01.pdf>.

91. Advisory Opinion No. 05-01, *supra* note 89, at 3; *see also* Op. Dep’t of Health & Human Servs., OIG No. 05-03 (Feb. 10, 2005), *available at* <http://oig.hhs.gov/fraud/docs/advisoryopinions/2005/ao0503.pdf>; Op. Dep’t of Health & Human Servs., OIG No. 05-06 (Feb. 18, 2005), *available at* <http://oig.hhs.gov/fraud/docs/advisoryopinions/2005/ao0506.pdf>.

92. Op. Dep’t of Health & Human Servs., OIG No. 05-02 (Feb. 10, 2005), *available at* <http://oig.hhs.gov/fraud/docs/advisoryopinions/2005/ao0502.pdf>; Op. Dep’t of Health & Human Servs., OIG No. 05-04 (Feb. 10, 2005), *available at* <http://oig.hhs.gov/fraud/docs/advisoryopinions/2005/ao0504.pdf>; Op. Dep’t of Health & Human Servs., OIG No. 05-05 (Feb. 18, 2005), *available at* <http://oig.hhs.gov/fraud/docs/advisoryopinions/2005/ao0505.pdf>.

93. Advisory Opinion No. 05-01, *supra* note 89, at 8. OIG did conclude that “open as needed” policies for surgical tray items did not run afoul of the CMP statute because the “insubstantial time” required to open them did not constitute a reduction or limitation of services. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 8-9.

procedures involved.⁹⁹ The data were used to establish maximum thresholds beyond which savings would not be shared with the physician.¹⁰⁰ Fifth, in the case of product standardization incentives, the arrangements did not unduly limit the selection of cardiac devices available to the physician.¹⁰¹ Sixth, the hospital and physician will disclose the arrangement to patients in writing.¹⁰² Seventh, “the financial incentives [were] reasonably limited in duration and amount.”¹⁰³ Eighth, payments were to be made by the hospital to the physician or surgeon’s practice group to be distributed on a per capita basis, not to the individual physician.¹⁰⁴

With respect to the Anti-Kickback statute, OIG concluded that the “safe harbor” for personal services and management contracts¹⁰⁵ did not apply to the arrangements, because the percentage payment did not meet the “set in advance” requirement.¹⁰⁶ However, OIG concluded that the incentive payments did not appear to be based on a prohibited intent to induce referrals, or present a risk of overutilization, for three reasons.¹⁰⁷ First, participation in each program was limited to surgeons or cardiologists already members of the participating practice group, potential savings were capped based on the prior year’s admissions, and the hospital’s contract with the practice group was limited to one year.¹⁰⁸ Second, the participating practice groups did not include other nonparticipating physicians or surgeons.¹⁰⁹ The per capita distribution method “mitigat[ed] any incentive for an individual [participant] to generate disproportionate cost savings.”¹¹⁰ Third, each proposal specifically set out the particular actions that would generate cost savings.¹¹¹ Although the measures appeared to present minimal patient risk, the physician would shoulder any liability burden.¹¹² The proposals appeared to reasonably compensate the physician for the exposure.¹¹³

Notwithstanding the tension between the advisory opinions and the 1999 Special Advisory Bulletin, OIG emphasized that the former do not represent a policy change. Each advisory opinion contained such a disclaimer.¹¹⁴ OIG

99. *Id.* at 9.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 8-9.

105. 42 C.F.R. § 1001.952(d) (2005).

106. Advisory Opinion 05-01, *supra* note 89, at 11.

107. *Id.* at 12.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *See, e.g., id.* at 9-10 (noting that “[t]he Proposed Arrangement is markedly different from many “gainsharing” plans, particularly those that purport to pay physicians a percentage of

further reiterated its position in congressional testimony by OIG Chief Counsel Lewis Morris.¹¹⁵ However, Morris pointed to a distinction between so-called “black box” gainsharing typical of earlier practices and the arrangements described in the 2005 advisory opinions.¹¹⁶ Morris characterized “black box” gainsharing as “arrangements that give physicians money for overall cost-savings without knowing what specific actions the physicians are taking to generate those savings.”¹¹⁷ Morris testified that, in “evaluating a particular . . . program, OIG . . . generally focuse[s] on three areas: accountability, quality controls, and safeguards against payments for referrals.”¹¹⁸ Morris warned that “any broad reading of the [advisory] opinions should be done with caution. Different cost-saving measures or different payment structures could have produced different results.”¹¹⁹ Clearly, the 2005 advisory opinions represent only the beginning of the renewed gainsharing debate.¹²⁰

*B. Recent Court Decisions Under the False Claims Act (“FCA”)*¹²¹

1. *Causing the Submission of a False Claim.*—In *United States ex rel. Schmidt v. Zimmer, Inc.*,¹²² the Third Circuit applied tort law concepts of intervening and superseding cause to a qui tam action against Zimmer, a manufacturer of orthopedic implants. Zimmer contracted with a purchasing agent to supply implants to a group of participant hospitals.¹²³ According to the complaint, the contract provided for a discount on each implant once the number of implants ordered by the participant exceeded the number ordered the year

generalized cost savings not tied to specific, identifiable cost-lowering activities”).

115. *Gainsharing Arrangements: Hearing on Oct. 7, 2006 Before the Subcomm. on Health of the H. Comm. on Ways and Means*, 109th Cong. 1-4 (2005) (statement of Lewis Morris, Chief Counsel, U.S. Department of Health and Human Services Office of Inspector General), available at <http://oig.hhs.gov/testimony/docs/2005/Gainsharing10-07-05.pdf>.

116. *Id.*

117. *Id.* at 3.

118. *Id.*

119. *Id.* at 4.

120. See Hospital Fair Competition Act of 2005, S. 1002, 109th Cong. (2005) (having been sponsored by Senators Grassley and Baucus and proposing to authorize certain “coordinated care arrangements between hospitals and physicians,” meaning gainsharing arrangements).

121. 31 U.S.C. §§ 3729-3733 (2000). The FCA authorizes the United States to bring a civil action against persons who, among other things, knowingly present a false or fraudulent claim to the government. *Id.* § 3729(a). If found liable, the defendant must pay three times the actual damages suffered by the government, plus a civil penalty of \$5500 to \$11,000 per claim. *Id.* So-called qui tam provisions permit, with certain limitations, a private citizen known as a “relator” to commence an FCA suit on behalf of the government, in which the United States Department of Justice may elect to intervene. *Id.* § 3730(b)(1). If the suit is successful, the relator may receive between fifteen to thirty percent of the government’s recovery. *Id.* § 3730(d).

122. 386 F.3d 235 (3d Cir. 2004).

123. *Id.* at 237.

before. Also, each participant allegedly would receive a two percent bonus on implant purchases if it met preset market share and volume purchase commitments.

The complaint alleged that Medicare cost reports filed by the participants failed to disclose the rewards the participant received from Zimmer. This allegedly violated the certification contained on the cost report form, which required the entity submitting the report to certify that the costs submitted were true and correct. The complaint alleged violations of the Anti-Kickback Statute and the Stark self-referral ban.¹²⁴

Zimmer argued that it did not file cost reports and had no reason to know what the hospitals' reports would contain and thus did not "cause" the hospitals to submit false reports. The district court granted Zimmer's motion to dismiss. The Third Circuit reversed, holding that the complaint sufficiently alleged that Zimmer "pursued a marketing scheme that it knew would, if successful, result in the submission by [the hospitals] of compliance certifications required by Medicare that Zimmer knew would be false."¹²⁵ The panel specifically applied

ordinary causation principles from negligence law in determining responsibility under the FCA. Under those principles, the "intervention of a force which is a normal consequence of a situation created by the actor's . . . conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about."¹²⁶

Thus, even if the hospitals' allegedly false certifications were an unlawful act, they did not absolve Zimmer from responsibility as a superseding cause.¹²⁷ The doctrine did not apply because the complaint alleged that Zimmer "realized or should have realized the likelihood" that false certifications would be made as a part of the discount arrangement.¹²⁸

2. *Displacement of Common Law Remedies.*—In *United States v. Lahey Clinic Hospital, Inc.*,¹²⁹ the United States sued to recover alleged Medicare Part B overpayments. The complaint alleged common law theories of unjust enrichment and payment under mistake of fact. The government invoked subject matter jurisdiction under 28 U.S.C. § 1345, the general "United States as plaintiff" jurisdictional statute.

The First Circuit rejected the defendant's argument that the United States could only recover overpayments through the administrative process established under the Medicare Act.¹³⁰ It also rejected the contention that the Act implicitly repealed section 1345 and displaced underlying common law causes of action to

124. See *supra* notes 88-90 and accompanying text.

125. *Zimmer*, 386 F.3d at 244.

126. *Id.* (omission in original) (quoting RESTATEMENT (SECOND) OF TORTS § 443).

127. *Id.* at 244-45.

128. See *id.* at 245 n.11.

129. 399 F.3d 1 (1st Cir.), *cert. denied*, 126 S. Ct. 339 (2005).

130. See 42 U.S.C. § 405 (g)-(h) (2000); see also 42 U.S.C. § 1395.

recover overpayments.¹³¹ “In the context of recovery of overpayments, the government has broad power to recover monies wrongly paid from the Treasury, even absent any express statutory authorization to sue.”¹³²

3. *Materiality of False Statement*.—In *United States ex rel. A+Homecare, Inc. v. Medshares Management Group, Inc.*,¹³³ the Sixth Circuit joined other circuits¹³⁴ in holding that a false claim or statement must be “material” to support an action under the FCA.¹³⁵ The panel adopted the “natural tendency” standard articulated by the Supreme Court.¹³⁶ “[A] false statement is material if it has a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed.”¹³⁷ Under this standard, a false accrual entry for pension expense on a cost report was material, even though it was disallowed by the fiscal intermediary.¹³⁸ “A party cannot file a knowingly false claim on the assumption that the fiscal intermediary will correctly calculate the value in the review process.”¹³⁹

4. *FCA Pleading Requirements*.—FCA claims, being a species of fraud, must be pleaded with particularity.¹⁴⁰ In *United States ex rel. Gross v. AIDS Research Alliance-Chicago*,¹⁴¹ the relator, a participant in a research study of an off-label investigational new drug for the treatment of AIDS, alleged various acts of negligence, mismanagement, and poor oversight of the study. This allegedly caused the defendants “to be noncompliant with a laundry list of federal regulations . . . , various study protocols, and ‘Good Clinical Practices.’”¹⁴² The complaint alleged that the defendants submitted various study reports to the government, but did not allege what the contents of the reports were, nor what if any, relation the reports bore to grant payments.

The Seventh Circuit observed that the “fraudulent statement’s purpose must

131. *Lahey*, 399 F.3d at 15.

132. *Id.* Query whether, in electing to bypass the administrative process and sue on a common law unjust enrichment theory, the government risks exposure to common law-based counterclaims arising out of alleged underpayments. *Cf.* *United States v. Royal Geropsychiatric Servs., Inc.*, 8 F. Supp. 2d 690 (N.D. Ohio 1998) (dismissing provider’s counterclaim for declaratory judgment in FCA suit for failure to exhaust administrative remedies).

133. 400 F.3d 428 (6th Cir.), *cert. denied*, 126 S. Ct. 797 (2005).

134. *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 679 (5th Cir. 2003); *United States ex rel. Costner v. URS Consultants, Inc.*, 317 F.3d 883, 887 (8th Cir. 2003); *Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 732-33 (7th Cir. 1999); *United States ex rel. Berge v. Bd. of Trs.*, 104 F.3d 1453, 1459 (4th Cir. 1997); *United States v. TDC Mgmt. Corp.*, 24 F.3d 292, 298 (D.C. Cir. 1994).

135. *Medshares*, 400 F.3d at 442.

136. *Id.* at 445; *see also* *Neder v. United States*, 527 U.S. 1, 20-22 (1999).

137. *Medshares*, 400 F.3d at 445 (second alteration in original) (citation omitted).

138. *See id.* at 447 n.13.

139. *Id.* at 447.

140. FED. R. CIV. P. 9(b).

141. 415 F.3d 601 (7th Cir. 2005).

142. *Id.* at 603.

be to coax a payment of money from the government.”¹⁴³ The panel held that the complaint alleged nothing more than that all of the reports and filings, taken together, constituted false certifications of compliance with applicable regulations. “These conclusory allegations shed no light on the nature or content of the individual forms or why any particular false statement would have caused the government to keep the funding spigot open, much less when any payments occurred or how much money was involved.”¹⁴⁴ The complaint was also deficient for failing to allege that any particular certification of regulatory compliance was a condition of payment.¹⁴⁵

5. *FCA Claims Based on Violation of Anti-Kickback Statute.*—In *United States ex rel. McNutt v. Haleyville Medical Supplies, Inc.*,¹⁴⁶ the United States intervened in a qui tam action based upon alleged kickbacks made by various medical services companies to pharmacists, respiratory therapists, and a doctor’s patient representative. The complaint alleged that the defendants disguised the kickbacks as rental payments and commissions.¹⁴⁷ The district court denied a motion to dismiss and certified a very straightforward issue for interlocutory appeal: “[W]hether a violation of the Anti-Kickback statute . . . can form a basis for a[n FCA] claim.”¹⁴⁸ The Eleventh Circuit affirmed. Asserting that compliance with the Anti-Kickback statute was a condition of payment of a Medicare claim, the panel held that a claim arising from a kickback was not eligible for payment. A claim for payment under those circumstances was one “for which payment is known by the claimant not to be owed” and is therefore false.¹⁴⁹

C. New Indiana False Claims and Whistleblower Protection Act

In 2005 the Indiana General Assembly enacted the False Claims and Whistleblower Act¹⁵⁰ patterned after the federal version¹⁵¹ and those adopted in other states. Although the Act is too new to have generated precedent, it will clearly affect future enforcement of alleged fraud and abuse violations at the state level.

The Act applies to false claims against the state, defined as “Indiana or any agency of state government.” The term “State” expressly excludes political subdivisions.¹⁵² It specifically “does not apply to a claim, record, or statement

143. *Id.* at 604.

144. *Id.* at 605.

145. *Id.*

146. 423 F.3d 1256 (11th Cir. 2005).

147. *Id.* at 1258.

148. *Id.* at 1258-59.

149. *Id.* at 1259.

150. Pub. L. No. 222-2005 § 23; IND. CODE § 5-11-5.5-1 (2005).

151. 31 U.S.C. §§ 3729-3730(h) (2000).

152. IND. CODE § 5-11-5.5-1(6).

concerning income tax” under Indiana Code section 6-3.¹⁵³ The Act applies to one

who knowingly or intentionally: (1) presents a false claim to the state for payment or approval; (2) makes or uses a false record or statement to obtain payment or approval of a false claim . . . ; (3) with intent to defraud . . . , delivers less money or property to the state than the amount recorded on the certificate or receipt the person receives from the state; (4) with intent to defraud the state, authorizes issuance of a receipt without knowing that the information on the receipt is true; (5) receives public property as a pledge of an obligation on a debt from an employee who is not lawfully authorized to sell or pledge the property; (6) makes or uses a false record or statement to avoid an obligation to pay or transmit property to the state; [or] (7) conspires with another person[, or causes another person to violate the statute].¹⁵⁴

Violators are liable for a “civil penalty of at least five thousand dollars (\$5,000) and for up to three (3) times the amount of damages sustained by the state.”¹⁵⁵

The Attorney General and Inspector General¹⁵⁶ have concurrent investigative jurisdiction.¹⁵⁷ If the Attorney General discovers a violation, that office may initiate suit. If the Inspector General discovers a violation, that office must first certify the finding to the Attorney General. If the Attorney General declines to act, the Inspector General may proceed.¹⁵⁸

The Act contains *qui tam* provisions similar to the federal version. A private citizen (referred to in federal parlance as a “relator”) may initiate a civil lawsuit against a violator. Once an action is filed, no person other than the Attorney General or Inspector General may bring another action based on the same facts.¹⁵⁹ The Attorney General or Inspector General may intervene in the action and thereafter control the prosecution.¹⁶⁰

The Attorney General or Inspector General may move to dismiss the action on motion for cause shown,¹⁶¹ or may seek dismissal in order to permit pursuit of the claim through an administrative proceeding, “including an administrative proceeding or a proceeding brought in another jurisdiction” which presumably includes a federal proceeding.¹⁶²

If the state prevails, the relator may receive a share of the state’s recovery,

153. *Id.* § 5-11-5.5-2(a).

154. *Id.* § 5-11-5.5-2(b).

155. *Id.*

156. The same statute, Pub. L. No. 222-2005, § 14, legislatively created the Office of Inspector General.

157. IND. CODE § 5-11-5.5-3(a).

158. *Id.* § 5-11-5.5-3(b)-(c), (e).

159. *Id.* § 5-11-5.5-4(g).

160. *Id.* § 5-11-5.5-5(a).

161. *Id.* § 5-11-5.5-4(b).

162. *Id.* § 5-11-5.5-5(h).

together with reasonable attorney's fees and an amount to cover the expenses and costs of bringing the action.¹⁶³ As with the federal version, if the Attorney General or Inspector General intervened, the relator's share is fifteen to twenty percent of the proceeds.¹⁶⁴ If neither intervenes and the relator proceeds alone, the relator's share becomes twenty-five to thirty percent.¹⁶⁵ If the Attorney General or Inspector General intervenes, and it is determined "that the evidence used to prosecute the action consisted primarily of information contained in: (A) a transcript of a criminal, civil, or legislative hearing; (B) a legislative, and administrative, or other public report, hearing, audit, or investigation; or (C) a news media report," the relator's share is lowered to ten percent.¹⁶⁶

As with the federal statute, the Act includes a "whistleblower" provision which grants a right of action to "an employee who has been discharged, demoted, suspended, threatened, harassed or otherwise discriminated against in the terms and conditions of employment"¹⁶⁷ because the employee objected to an act in violation of the statute; or initiated, testified, or assisted in the investigation or related proceedings. In addition to reinstatement, the employee may recover up to two times back pay with interest, special damages, reasonable attorney fees, and the costs and expenses of litigation.¹⁶⁸

The Act grants the Attorney General and Inspector General investigative subpoena power through so-called "civil investigative demands." These may be issued in connection with an investigation involving a false claim. A civil investigative demand may call for the production of documentary material, or may demand testimony or answers to written interrogatories.¹⁶⁹ With a few exceptions set out in the statute, procedures follow the Indiana Trial Rules.¹⁷⁰

A person who fails to comply with a civil investigative demand is subject to Trial Rule 37 sanctions to the same extent as a person who has failed to cooperate in discovery. However, a person who objects to a civil investigative demand may seek a protective order under Trial Rule 26(C).¹⁷¹ The Act does not specify the procedure by which such a request is to be brought to a court's attention.

III. TAX

A. Congressional Hearings on Tax-Exempt Hospitals

Once again, questions regarding hospital tax exempt status and threats of

163. *Id.* § 5-11-5.5-6(a).

164. *Id.*

165. *Id.* § 5-11-5.5-6(a)(3).

166. *Id.* § 5-11-5.5-6(a)(2).

167. *Id.* § 5-11-5-8(a).

168. *Id.* § 5-11-5.5-8(b).

169. *Id.* § 5-11-5.5-10.

170. *Id.* § 5-11-5.5-18.

171. *Id.* § 5-11-5.5-16.

increased enforcement actions have been in the spotlight of tax issues affecting tax-exempt hospitals this year. However, little enforcement action has been taken to date and there has been little change in the basic standards governing health care provider tax exemption at the federal level in the past thirty-six years.¹⁷² However, new critics of hospital tax exempt status are emerging including IRS Commissioner Mark Everson, who has warned of “the gathering storm” of enforcement efforts.¹⁷³ Additionally, congressional hearings in 2004 to 2005 have focused on hospital charges to the uninsured, charity care, and tax exemption, claiming that tax-exempt hospitals are not doing enough charity care in return for their tax-exempt status.

Over the past year, both the Senate Finance Committee and the House of Representative Ways and Means Committee have heard extensive debate regarding whether hospitals are sufficiently charitable to warrant continued tax-exempt status. On May 26, 2005, Commissioner Everson testified before the House Ways and Means Committee, at a hearing titled “A Review of the Tax-Exempt Hospital Sector,” and warned that the evolution of the health care industry has “created opportunities for noncompliance” stating that the IRS would vigorously monitor and deter abuse by tax-exempt organizations.¹⁷⁴ Commissioner Everson noted, “[i]t is difficult to differentiate for-profit from nonprofit health care providers . . . [and while the] overwhelming majority of charitable organizations do their utmost to comply with the letter and spirit of the tax law[,] . . . there are increasing indications that the twin cancers of technical manipulation and outright abuse that we saw develop in the profit-making segments of the economy are now spreading to pockets of the nonprofit sector.”¹⁷⁵

A major discussion at the hearing focused on a report prepared by the U.S. Government Accountability Office at the Committee’s request. The report, titled “Nonprofit, For-profit, and Government Hospitals: Uncompensated Care and Other Community Benefits,” compared the level of charity care provided by for-profit, nonprofit and government hospitals in five states, including Indiana.¹⁷⁶ Generally, the report found that government hospitals devoted substantially larger shares of their patient operating expenses to uncompensated care than did

172. Non-profit hospitals and health care organizations are exempt from federal income tax as organizations described in Internal Revenue Code (“IRC”) section 501(c)(3) if they are operated and organized exclusively for charitable purposes within the meaning of the statute. Revenue Ruling 69-545 sets forth the rationale for federal tax exemption, stating that hospitals promote the health of a broad cross-section of the community, operating for “community benefit” and serving a charitable purpose. Rev. Ruling 69-545, 1969-2 C.B. 117.

173. Allison Bennett, *Everson Cautions Exempts Must Work to Fix Problems or Face “Gathering Storm,”* 82 BNA, INC. DAILY TAX REP., Apr. 29, 2005, at G-9.

174. *A Review of the Tax-Exempt Sector Before the H. Comm. on Ways & Means*, 109th Cong. (2005) (statement of Mark Everson, Commissioner, Internal Revenue Service).

175. *Id.*

176. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-743T, NONPROFIT, FOR-PROFIT, AND GOVERNMENT HOSPITALS: UNCOMPENSATED CARE AND OTHER COMMUNITY BENEFITS (2005).

nonprofit and for-profit hospitals.¹⁷⁷ The non-profit hospitals' uncompensated care costs, as a percentage of patient operating costs, were higher than those of for-profit hospitals.¹⁷⁸ The burden of uncompensated care costs was not evenly distributed within each hospital group but was concentrated in a small number of hospitals.¹⁷⁹ However, regardless of the ownership status, all of the hospitals reported providing a wide range of other community benefits, including health education and clinic services.¹⁸⁰

The Senate Finance Committee, lead by Chairman Charles Grassley, is currently conducting its own investigation of tax-exempt hospital systems. On May 25, 2005, Grassley sent a letter to ten large hospitals and health systems requesting information in an effort "to learn whether the benefits they provide to the needy justify the tax breaks they receive."¹⁸¹ The letter sets forth twenty-five questions regarding charity care and community benefit and twenty-one questions regarding payments, charges, debt collection processes, and tax exempt status.¹⁸² The Senate Finance Committee is expected to introduce charity reform legislation. The legislation will consider recommendations submitted by the Panel on the Nonprofit Sector, formed by the Independent Sector at the request of the Senate Finance Committee.¹⁸³

Although it seems unlikely Congress will make any major changes to federal tax laws governing tax exemption for hospitals, it is likely some changes will occur as pressure from key congressional leaders continues to build and stepped-up enforcement actions continue.

B. IRS Examination of Tax-Exempt Organization

On November 4, 2004, the IRS published guidelines for tax-exempt organizations for 2005.¹⁸⁴ Executive compensation was listed as one of the four critical enforcement initiatives for fiscal year 2005. Scrutiny has focused on two main areas: the reporting or failure to report all forms of compensation and benefits on the organization's annual Form 990 return, and specific types of compensation and benefit practices, including, among others, no-interest or low-interest loans, supplemental retirement plans, spouse travel, gifts to executives

177. *Id.* at 3.

178. *Id.*

179. *Id.*

180. *Id.* at 4.

181. Press Release, Senate Fin. Comm., 109th Cong., Grassley Asks Non-Profit Hospitals to Account for Activities Related to Their Tax-Exempt Status (May 25, 2005), *available at* <http://finance.senate.gov/press/Gpress/2005/prg052505.pdf>.

182. *Id.*

183. SENATE FINANCE COMMITTEE, STAFF DISCUSSION DRAFT (2004), *available at* <http://www.senate.gov/~finance/hearings/testimony/2004test/062204stfdis.pdf> (proposing a legislative reform for tax-exempt healthcare providers).

184. I.R.S., FISCAL YEAR 2005 EXEMPT ORGANIZATIONS IMPLEMENTING GUIDELINES, *available at* http://www.irs.gov/pub/irs-tege/implementing_guidelines_1104.pdf.

and directors, and tax gross-ups.

In response, the IRS has revised two forms, Form 990 and Form 1023, both with a stated objective of helping the IRS monitor potential conflict of interests and uncover possible tax avoidance transactions such as excessive compensation. Required for all applications for tax-exempt status after May 1, 2005, the new Form 1023 asks about payments to third parties who helped create the organization; requests information about compensation and other financial arrangements with officers, directors, trustees, employees, and independent contractors; inquires about how the organization sets compensation that is reasonable; requests information about family and business relationships and the presence of conflict of interest policies within the organization; and asks organizations to describe the benefits of membership, membership requirements, and the relationship between individuals who receive benefits and key individuals within the organization.¹⁸⁵

The IRS also revised Form 990 and Form 990 Schedule A.¹⁸⁶ Under the revised Form 990 Schedule A, organizations will have to disclose the compensation paid to the five highest paid independent contractors providing “other” services, in addition to the already required disclosure of information on the five highest paid independent contractors providing professional services.¹⁸⁷ Among the changes to revised Form 990: (1) organizations will have to disclose the total compensation paid to directors, officers, and key employees, including compensation from related entities of the organization; (2) directors, officers, and key employees of an organization will have to disclose information regarding family or business relationships; (3) organizations will have to report income to former directors, officers, and key employees including, among others, retirement packages and deferred compensation plans; and (4) organizations will have to disclose whether they have a written conflict of interest policy.¹⁸⁸ The changes to Form 990 and Form 990 Schedule A were only proposed at the time this Article was drafted. The IRS was considering comments as it worked to finalize these forms.

Finally, the IRS has also published proposed regulations clarifying the relationship of the substantive requirements of tax-exempt status under section 501(c)(3) and imposition of intermediate sanctions under IRC section 4958.¹⁸⁹ The proposed regulations provide guidance on the specific factors that the IRS will use in determining whether a section 501(c)(3) organization is jeopardizing

185. Revised Form 1023 is available online. I.R.S., Dep’t of the Treas., Form No. 1023, Application for Recognition of Exemption (2004), *available at* <http://www.irs.gov/pub/irs-pdf/f1023.pdf>.

186. Revised Form 990 is now available online. I.R.S., Dep’t of the Treas., Form No 990, <http://www.irs.gov/pub/irs-pdf/f990.pdf>.

187. *Id.*

188. *Id.*

189. Standards for Recognition of Tax-Exempt Status if Private Benefit Exists or if an Applicable Tax-Exempt Organization Has Engaged in Excess Benefit Transaction(s), 70 Fed. Reg. 53,599 (Sept. 9, 2005) (to be codified at 26 C.F.R. pts. 1 and 53).

its tax exempt status as a result of engaging in one or more excess benefit transactions and sets forth a “facts and circumstances” test to be applied in the determination.¹⁹⁰ In considering whether to revoke tax-exempt status, the IRS will examine all relevant facts and circumstances, including: (1) the size and scope of the organization’s regular exempt activities; (2) the relationship between the size and scope of the excess benefit transaction(s) and the organization’s regular exempt activities; (3) whether the organization has been involved in repeated excess benefit transactions; (4) whether the organization has adopted compliance measures intended to prevent the occurrence of future intermediate sanctions violations; and (5) whether the excess benefit transaction has been corrected or the organization has made a good faith effort to correct.¹⁹¹

C. State and Local Tax Exemption Developments

The federal government is not the only one scrutinizing the practices of tax-exempt organizations, state and local authorities are showing renewed interest in hospital property tax exemptions. Local property tax exemptions are the biggest savings for tax-exempt hospitals, followed by state and federal taxes. Local government and municipalities, squeezed for revenue, have begun to challenge property tax exemptions, either as outright attacks on the hospitals’ exempt status or as demands for payments in lieu of taxes (“PILOTs”).¹⁹²

Recently, the Illinois Department of Revenue revoked the state property tax exemption for Provena Covenant Medical Center at the recommendation of the Champaign County Board of Review.¹⁹³ After an ownership change, Provena Covenant Medical Center reapplied for the property tax exemption. Provena was denied the property tax exemption based on a number of factors, including Provena’s community benefit report, which primarily consisted of bad debt write-offs; volunteer work done by hospital employees on their own time; and Provena’s aggressive collection tactics including the use of collection agencies, lawsuits, and even “body attachments,” the legal term for the arrest of debtors who fail to show up in court.¹⁹⁴ Provena appealed the decision and is awaiting an administrative law judge’s decision.

Also, in April, the Champaign County Board of Review recommended that another Illinois non-profit hospital be denied a property tax exemption for five

190. *Id.* at 53,602.

191. *Id.*

192. PILOTs have been especially prevalent in Pennsylvania, which recently passed legislation to objectify the standards for tax exemption after a large number of local exemption challenges. 10 PA. CONS. STAT. §§ 371-85 (1999).

193. Lucette Lagnado, *Hospital Found “Not Charitable” Loses Its Status as Tax Exempt*, WALL ST. J., Feb. 19, 2004, at B1; *see also* Julie Appleby, *Scales Tipping Against Tax-Exempt Hospitals: Critics Challenge Bill Collection, Charity Care, Salaries at Non-Profits*, U.S.A. TODAY, Aug. 24, 2004, at 1B.

194. *Id.*

parcels of land.¹⁹⁵ The board recommended that the Carle Foundation's property tax exemption be denied because of the foundation's inadequate provision of charity care, pointing to the fact that the Carle Foundation only spends one-half of one percent of its revenue on charity care, and its close association with a for-profit physicians group. The board argued that the primary use of the Hospital is to serve as a platform from which the physicians group and individual physicians privately benefit.¹⁹⁶

D. Charity Care Class Action Litigation

Since July 2004, class action lawsuits alleging that hospitals have charged uninsured patients fees well in excess of the amounts paid on behalf of insured patients have been initiated in federal courts. However, the judicial consensus is that these cases do not present viable federal claims.¹⁹⁷

The lawsuits, orchestrated by Richard Scruggs, a plaintiffs' attorney who is credited with developing an aggressive, successful litigation strategy against the tobacco industry in the 1990s, are postured as class actions against a tax-exempt hospital system, the American Hospital Association ("AHA"), and additional defendants including officers, directors, attorneys, and other persons who have participated in the hospitals' decision-making process regarding pricing, billing, and collection practices.¹⁹⁸ The complaints seek monetary damages; ask courts to impose constructive trusts on the defendants' assets; and seek injunctions prohibiting the hospital from charging the uninsured the full undiscounted cost of care, charging the uninsured more than insured patients for the same services, and prohibiting the use of aggressive and abusive collection practices in an

195. Text of the Recommendation can be found at <http://www.co.champaign.il.us/BOR/CARLE2004.pdf> (last visited July 2, 2006).

196. *Another Nonprofit Hospital Caught in Move to Revoke Property Tax Break*, BNA, INC. DAILY TAX REP. No. 79, Apr. 26, 2005, at H-3.

197. See *Amato v. UPMC*, 371 F. Supp. 2d 752 (W.D. Pa. 2005); *Lorens v. Catholic Health Care Partners, Inc.*, 356 F. Supp. 2d 827 (N.D. Ohio 2005); *Shriner v. ProMedica Health Sys.*, 2005 WL 139128 (N.D. Ohio Jan. 21, 2005); *Burton v. Beaumont Hosp.*, 373 F. Supp. 2d 707 (E.D. Mich. 2005); *Darr v. Sutter Health*, 2004 WL 2873068 (N.D. Cal. Nov. 30, 2004); *Kizzire v. Baptist Health Sys.*, 343 F. Supp. 2d 1074 (N.D. Ala., 2004); *Ferguson v. Centura Health Corp.*, 358 F. Supp.2d 1014 (D. Colo., 2004); *In re Not-for-Profit Hospital/Uninsured Patients Litigation*, 341 F. Supp. 2d 1354 (Judicial Panel on Multidistrict Litigation 2004).

198. See Non-Profit Litigation Website, <http://www.nfplitigation.com> (last visited Jan. 24, 2006) (providing press releases, fact sheets, background information and copies of the filed complaints). This website has been taken down because most of the federal cases have been dismissed. However, plaintiffs' lawyers have refiled many of the claims in state courts. These claims focus more on "disparate pricing" than "charity care" and allege, among others, breach of contract and state consumer protection claims. See *Sutter Health Files Counterclaim in Class Action over Group's Charity Care Program*, 6 BNA, INC., CLASS ACTION LITIGATION 623 (2005); Matthew Roberts & Mindy Staley, *Hospitals Face Challenges to Tax-Exempt Status*, CHARLOTTE BUS. J., Dec. 2, 2005.

attempt to collect fees from the uninsured.¹⁹⁹ The current lawsuits seem to be a part of the larger, national debate on what “charitable” means and whether nonprofits are deserving of their tax exempt status.

IV. QUALITY ASSESSMENT AND IMPROVEMENT

A. *Patient Safety and Quality Improvement Act of 2005*

On July 29, 2005, the Patient Safety and Quality Improvement Act of 2005 (“Act”)²⁰⁰ was signed into law by President George W. Bush. The Act amends the Public Health Service Act²⁰¹ by establishing confidentiality and privilege protections for information obtained from the voluntary reporting of medical errors.²⁰² The Act comes as a response to the recommendations of the Institute of Medicine’s (“IOM”) 1999 report *To Err is Human: Building a Safer Health System*.²⁰³ In the report, the IOM recommended that Congress “extend comprehensive peer review protection to provider-generated quality improvement and patient safety information and create a patient safety reporting system that would allow providers to report medical error in a non-punitive environment.”²⁰⁴

The Act protects “patient safety work product” which is defined as

any data, reports, records, memoranda, analyses (such as root cause analyses), or written or oral statements . . . which . . . are assembled or developed by a provider for reporting to a patient safety organization and are . . . reported to a patient safety organization or developed by a patient safety organization for the conduct of patient safety activities²⁰⁵

Medical records, discharge information, and other information maintained or developed separate from the patient safety evaluation system is specifically excluded from the definition of patient safety work product. Pursuant to the Act, the privilege and confidentiality protections are only afforded to information that is actually reported, the mere assembling for the purpose of reporting medical errors or other quality information programs is not enough to trigger protection.²⁰⁶ Also, unlike HIPAA or state law reporting privileges, patient safety work product continues to be privileged and confidential after disclosure.

Patient safety work product is voluntarily reported to patient safety organizations (“PSOs”), which are to contract with providers of health care

199. *Id.*

200. Pub. L. No. 109-41, 119 Stat. 425 (2005).

201. 42 U.S.C. §§ 2996-21 to -26.

202. Pub. L. No. 109-41, 119 Stat. 425 (2005).

203. INSTITUTE OF MEDICINE, *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM* (2000).

204. Deborah A. Datte et. al., *National Peer Review Protection? Understanding the New Patient Safety and Quality Improvement Act of 2005*, 9 HEALTH LAW. NEWS 11 (2005).

205. Pub. L. No. 109-41, 119 Stat. 425 (2005) (adopting new Public Health Service Act § 921(7)).

206. *Id.*

services to receive and review the patient safety work product. PSOs are entities whose “mission and primary activity” are “to conduct activities that are to improve patient safety and the quality of health care delivery.”²⁰⁷ For recognition as a PSO, the entity needs to provide the Secretary of DHHS with a certification that the entity has policies and procedures in place to perform “patient safety activities” including: (1) “[e]fforts to improve patient safety and the quality of healthcare”; (2) “[t]he collection and analysis of patient safety work product”; (3) “[t]he development and dissemination of information with respect to improving patient safety, such as recommendations, protocols, or information regarding best practices”; (4) “[t]he utilization of patient safety work product for the purposes of encouraging a culture of safety and of providing feedback and assistance to effectively minimize patient risk”; (5) “[t]he maintenance of procedures to preserve confidentiality with respect to patient safety work product”; and (6) “[t]he provision of appropriate security measures with respect to patient safety work product.”²⁰⁸ In short, a PSO is more than a repository for patient safety information, “[i]t must have an active staff, function to analyze the work product reported to it, and make recommendations for the improvement of care.”²⁰⁹

The Act contains a whistle-blower protection provision which protects the individuals who report medical errors. The provision prohibits providers from taking “adverse employment action,” including the loss of employment, failure to promote, failure to provide any employment related benefit that the individual is otherwise entitled to, and adverse evaluation or decisions relating to the accreditation, certification, credentialing, or licensing of the individual.²¹⁰

B. Indiana Medical Error Reporting System

Indiana recently became the second state to enact mandatory reporting requirements for healthcare providers.²¹¹ Effective January 1, 2006, Indiana hospitals are required to report a delineated number of medical errors to the Indiana Department of Health (“DOH”).²¹² The DOH passed the emergency rule in response to Executive Order 05-10, a directive to establish a medical error

207. 42 U.S.C. § 299(b)-24(b)(1)(A) (2005) (adopting new Public Health Service Act § 924).

208. *Id.* § 299(b)-21(5) (adopting new Public Health Service Act § 921(8)).

209. Datte et al., *supra* note 204.

210. Pub. L. No. 109-41, 119 Stat. 425 (2005) (adopting new Public Health Service Act § 922(e)).

211. Minnesota was the first state to provide a mandatory medical error reporting mechanism. *See* MINN. STAT. §§ 144.706-144.7069 (2004); *see also* National Academy for State Health Policy, *State Patient Safety Centers: A New Approach to Promote Patient Safety*, http://www.nashp.org/Files/final_web_report_11.01.04.pdf.

212. LSA Document #05-326(E). LSA Document #05-326(E) is an emergency rule effective until proposed rule 05-193 is finalized. Proposed Rule 05-193 will be published in the February 2005 Indiana Register for public comment.

reporting and quality system.²¹³ Executive Order 05-10 required the DOH to develop minimum standards for medical error reporting, and mandated conferring with various hospitals, physicians, pharmacist representatives, and quality improvement experts while also consulting best practice guides in developing the standards.

The regulations require hospitals to report multiple types of errors and make a lists of mistakes available for public review.²¹⁴ The first list of hospital errors is expected to be released in 2007. Governor Mitch Daniels believes that a successfully implemented medical error reporting program will reduce the frequency of medical errors, reveal causes of error, and enable health professions to design methods to prevent or discover errors before patients are harmed.²¹⁵ Pursuant to the executive order, the medical error reporting system ("MERS"): (1) should "ensure that patients' and healthcare professionals' identities are kept confidential," (2) "not be used as the basis for punishing any healthcare professional," (3) "require all healthcare professionals to report medical errors promptly," (4) "require hospitals to report all MERS data to the DOH," (5) "require DOH to regularly disseminate medical error data," (6) "require hospitals to provide patients with easy to understand aggregate data and trends analysis," and (7) "require hospitals to share successful solutions and improvements with other hospitals."²¹⁶ The DOH is currently accepting comments on proposed regulations.²¹⁷ The final regulations are expected to replace the emergency rule in spring 2006.

V. ANTITRUST

A. *Post-Consummation Challenge to Hospital Merger*

In 2005, the Federal Trade Commission ("FTC") successfully challenged a hospital merger post-consummation, resulting in an order of divestiture of the acquired facility. An FTC administrative law judge ("ALJ") determined that Evanston Northwestern Healthcare Corporation ("ENH") had consummated an illegal acquisition when it acquired Highland Park Hospital.²¹⁸ In *Evanston Northwestern Healthcare Corp.*,²¹⁹ the ALJ determined that the transaction lessened competition substantially in the market for acute care inpatient services and ordered that ENH divest Highland Park Hospital ("Highland Park").²²⁰

213. Ind. Exec. Order No. 05-10 (Jan. 10, 2005), available at http://www.in.gov/gov/media/eo/EO_05-10_Medical_Error_Reporting.pdf.

214. Indiana Department of Health, 29 Ind. Reg. 1742 (proposed Feb. 1, 2006).

215. Ind. Exec. Order No. 05-10.

216. *Id.*

217. 29 Ind. Reg. 1742.

218. Post-Acquisition Evidence Dooms Deal In Acute Care Inpatient Services Sector, 89 BNA, INC. ANTITRUST & TRADE REG. REP. 443 (2005) [hereinafter Post-Acquisition Evidence].

219. *Evanston N.W. Healthcare Corp.*, 70 Fed. Reg. 18,397 (FTC Apr. 11, 2005).

220. Post-Acquisition Evidence, *supra* note 218.

ENH acquired Highland Park in 2000 for more than \$200 million. The acquisition combined ENH's Evanston and Glenbrook Hospitals, both located in Cook County, Illinois, with Highland Park, the nearest hospital north of the two facilities.²²¹ The FTC contended that, after the acquisition, ENH raised prices far above the price increases of comparable hospitals.²²² ENH filed a notice of appeal on October 26, 2005.²²³

This case presented a rare opportunity to examine the actual effects of an acquisition on price in the hospital industry. Most antitrust analyses occur premerger and therefore involve projections based upon economic theory. This case also reversed a string of losses by the FTC and the Antitrust Division of the Department of Justice ("DOJ") in their attempts to challenge hospital mergers.

B. Physician Organizations

In 2005, the FTC entered into consent decrees for violations of Section 5 of the Federal Trade Commission Act ("FTC Act")²²⁴ with physicians groups in Chicago,²²⁵ Cincinnati,²²⁶ New Mexico,²²⁷ and South Carolina.²²⁸

The Chicago consent decree involved Evanston Health Network Corporation ("EHN") and EHN Medical Group, Inc. ("EHN Medical").²²⁹ EHN is a nonprofit corporation that owns EHN Faculty Practice Associates ("Faculty Practice"). Faculty Practice is a nonprofit corporation that employs about 460 salaried doctors.²³⁰ Faculty Practice is the sole shareholder of EHN Medical, which is a for-profit corporation that represents Faculty Practice and over 400 independent physicians in their contract negotiations with health plans.²³¹ The FTC alleged in its complaint that EHN Medical had violated Section 5 of the FTC Act by facilitating agreements among competing physicians to fix reimbursement rates.²³² The FTC found no integration among the physicians and alleged that the actions of EHN Medical increased the reimbursement rates paid by payors,

221. *Id.*

222. *Id.*

223. Notice of Appeal, *In re Evanston N.W. Healthcare Corp.*, No. 9315 (FTC Oct. 26, 2005), available at <http://www.ftc.gov/os/adjpro/d9315/051026enhnotofappeal.pdf>.

224. 15 U.S.C. § 45 (2005).

225. See *In re Evanston N.W. Healthcare Corp.*, 2005 FTC LEXIS 146 (Oct. 20, 2005).

226. See *New Millennium Orthopaedics, LLC*, 70 Fed. Reg. 24,588 (FTC May 10, 2005).

227. See *San Juan IPA, Inc.*, 70 Fed. Reg. 30,949 (FTC May 31, 2005).

228. See *Preferred Health Services, Inc.*, 70 Fed. Reg. 11,675 (FTC Mar. 9, 2005); *Partners Health Network*, 70 Fed. Reg. 47,202 (FTC Aug. 12, 2005).

229. *Physicians' Group Settles Cartel Charges, Will Cease Collective Bargaining Activities*, BNA, INC., ANTITRUST & TRADE REG. REP. 362 (2005) [hereinafter *Physicians' Group*]. Counts I and II of the complaint against EHN involved the acquisition of Highland Park Hospital, which was determined to be anticompetitive post-consummation. See discussion, *supra* Part V.A.

230. *Physicians' Group*, *supra* note 229.

231. *Id.*

232. *Id.*

employers, and patients.²³³

The South Carolina consent decree involved a physician-hospital organization (“PHO”), Partner’s Health Network, Inc. (“Partner’s Health”). Partner’s Health represented itself as a “messenger model” PHO. A messenger model is a structure through which competing physicians may obtain the efficiencies of price negotiations without coordinating reimbursement rates.²³⁴ The FTC said that Partner’s Health was not a legal messenger model because it enabled and assisted competing physicians in coordinating reimbursement rates and other terms with health plans and orchestrated refusals to deal.²³⁵

Each of the consent decrees prohibited the physician organizations from entering into agreements to negotiate with payors, other than through “qualified risk-sharing joint arrangements” and “qualified clinically integrated joint arrangements.”²³⁶ In a qualified risk-sharing joint arrangement, all physician participants share financial risk, which would create incentives to control costs jointly.²³⁷ A qualified clinically-integrated joint arrangement would require all physician participants to participate in active and ongoing programs to evaluate and modify their clinical practice patterns to create a high degree of interdependence and cooperation to control costs and ensure quality service.²³⁸ The consent decrees require the physician organizations to notify the FTC prior to engaging in certain actions for twenty years.

C. Competition Between Physician-Owned Specialty Hospitals and General Acute-Care Hospitals

A controversial topic in 2005 was the effect on general acute-care hospitals when physician-owned specialty hospitals enter a market. Physician-owned specialty hospitals have been criticized because they target the most profitable patients, leaving less profitable patients to be served by general acute-care hospitals. Federal law prohibits physicians from investing in general acute-care hospitals.²³⁹ Thus, to retaliate for loss of referrals, some general acute-care hospitals have terminated the privileges of physicians that have an ownership interest in specialty hospitals.²⁴⁰ Some physician-owners have challenged such terminations in court. Most such cases have been won by the general acute-care

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. 42 U.S.C. § 1395nn (2000). The Stark Law prevents physicians from referring Medicare and Medicaid “designated health services,” including inpatient and outpatient hospital services and a number of other items and services, to an entity with which the physician has a financial relationship unless an exception applies.

240. DAVID A. ARGUE, ECONOMISTS INC., COMPETITION BY PHYSICIAN-OWNED SPECIALTY HOSPITALS: A BRIEF ANALYSIS OF POLICY AND LITIGATION 3 (2005).

hospitals on the basis that the market at issue was competitive, irrespective of whether or not physician-owners of specialty hospitals were excluded from privileges at a particular hospital.

Similar arguments were used in *Arnett Physician Group, P.C. v. Greater Lafayette Health Services, Inc.*,²⁴¹ which addressed the termination of a physician group's exclusive service contract and HMO agreement, allegedly in response to the plaintiffs' attempt to open their own acute-care hospital.²⁴² A physicians' group and its affiliated clinic, health plan, and HMO brought the claim against the only existing hospital system in town and twenty-one doctors who had left the plaintiff to join a physician group affiliated with the defendant hospital.²⁴³ Plaintiffs claimed that the hospital had conspired with the defendant doctors to violate Section 1 of the Sherman Act in an effort to deny the plaintiffs access to consumers of general acute-care hospital services in the Lafayette, Indiana area.²⁴⁴ The court determined that staffing decisions at a single hospital cannot violate Section 1 of the Sherman Act and that the plaintiffs did not have antitrust standing or antitrust injury.²⁴⁵ The court found no evidence that would connect the defendant hospital's terminations to the effort to set up a competing acute-care hospital. It reiterated the principle that "antitrust laws protect competition, not competitors."²⁴⁶

D. Exclusive Dealing

A rare exclusive-dealing case received considerable publicity in 2005. The Third Circuit court of appeals affirmed a ruling that Dentsply International, Inc. ("Dentsply") had unlawfully maintained its monopoly over prefabricated artificial teeth through an exclusivity policy that prevented dealers from selling the artificial teeth of other manufacturers.²⁴⁷ In *United States v. Dentsply International, Inc.*,²⁴⁸ the court affirmed a ruling that Dentsply had monopoly power in a market consisting of the combined sale of artificial teeth to dental laboratories and dealers, and had excluded competitors.²⁴⁹ Dentsply controlled approximately seventy-five to eighty percent of the market for artificial teeth.²⁵⁰

In determining the relevant market, the court included both sales to the

241. 382 F. Supp. 2d 1092 (N.D. Ind. 2005).

242. Ashley McKinney Fisher, *Antitrust Health Care Recent Developments*, 2005 A.B.A. HEALTH CARE COMM. 1 (2005); *Arnett*, 382 F. Supp. 2d at 1095. The opinion does not indicate whether such acute care hospital was general or specialty.

243. *Arnett*, 382 F. Supp. 2d at 1095.

244. *Id.*

245. *Id.*

246. *Id.* at 1095, 1096.

247. *Dentsply's Exclusivity Policy Illegally Maintains its Artificial Tooth Monopoly*, 88 BNA, INC., ANTITRUST & TRADE REG. REP. 207 (2005) [hereinafter *Dentsply's Exclusivity*].

248. 399 F.3d 181 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 1023 (2006).

249. *Dentsply's Exclusivity*, *supra* note 247.

250. *Id.* (on a revenue basis).

laboratories and sales to the dental dealers.²⁵¹ The court concluded that Dentsply's share of the market was more than adequate to establish a prima facie case of market power and rejected the district court's finding that other manufacturers in the market could compete by marketing directly to dental labs.²⁵² In addition, Dentsply's actions demonstrated its intent to exclude competitors and maintain monopolistic power by successfully prohibiting dealers from handling competitors' teeth.²⁵³ Another indication of Dentsply's market power was its control of prices, which it was able to set without consideration of its competitors, something that a firm without monopoly power would not be able to do.²⁵⁴

In addition to market power, the Third Circuit also found that Dentsply used its power to adversely affect competition in the market.²⁵⁵ By effectively preventing dealers from carrying competitors' teeth, the ultimate users—the dental labs—also could not purchase teeth of other manufacturers, and thus could not fulfill customer requests for alternative teeth lines.²⁵⁶ These requests were denied by dealers because of fear of being cutoff by Dentsply. This situation created a barrier to entry to competitors in the market. Furthermore, the court determined that Dentsply's proffered business justification was pretextual and that Dentsply could not successfully show a pro-competitive objective for its exclusivity policy.²⁵⁷

Dentsply also involved allegations of resale price maintenance against Dentsply by dental labs. The dental labs purchased artificial teeth via a network of authorized dealers. If a dealer did not have the requested teeth in stock, Dentsply would "drop ship" teeth directly to the labs, but billing and collection services were still handled by the dealers.²⁵⁸ The plaintiffs alleged, inter alia, that Dentsply and its dealers agreed to allow Dentsply to set dealers' resale prices.²⁵⁹ Although Dentsply provided a "suggested price" list to dealers, which ordinarily is permissible, Dentsply went a step further by requiring any deviation from the suggested prices to be cleared with Dentsply; such deviations, once permitted, were allowed only when a lab was considering buying a competitor's product for reasons of price.²⁶⁰ In these instances, Dentsply, not the dealer, negotiated with the lab to determine a price at which the dealer would sell the teeth to the lab.²⁶¹ The dental labs alleged that these practices caused them to purchase teeth at

251. *Dentsply's Exclusivity*, *supra* note 247; *Dentsply*, 399 F.3d at 188.

252. *Dentsply's Exclusivity*, *supra* note 247.

253. *Id.*

254. *Id.*; *Dentsply*, 399 F.3d at 191.

255. *Dentsply*, 399 F.3d at 191.

256. *Dentsply's Exclusivity*, *supra* note 247.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Court Implants Overcharge Claim by Dental Labs Against Dentsply*, 89 BNA, INC., ANTITRUST & TRADE REG. REP. 305 (2005) [hereinafter *Court Implants*].

artificially high prices.²⁶²

Finally, the court of appeals in *Dentsply* allowed an exception to the *Illinois Brick*²⁶³ indirect purchaser rule by applying a co-conspirator exception in a resale price maintenance case involving the sale of artificial teeth.²⁶⁴ The indirect purchaser rule denies standing to purchasers suing manufacturers for illegal overcharges that have been “passed on” to the indirect purchasers through distributors or other middlemen,²⁶⁵ and generally results in end purchasers being denied the ability to recover for price fixing conspiracies of manufacturers. The policy behind this rule is to avoid duplicative recovery from the manufacturer by the middlemen and the ultimate purchaser.²⁶⁶ The court determined that dental laboratories have standing to sue Dentsply for alleged overcharges so long as the alleged co-conspirators—Dentsply’s dealer-middlemen—are named as defendants in the lawsuit.²⁶⁷

E. Rule of Reason Analysis for PBM Price Fixing Cases

In *North Jackson Pharmacy, Inc. v. Caremark RX, Inc.*,²⁶⁸ an independent retail pharmacy sued Caremark RX (“Caremark”), a pharmacy benefits manager, under Section 1 of the Sherman Act for Caremark’s efforts to negotiate reduced prices on behalf of its members, as well as for price fixing with other PBMs.²⁶⁹ The plaintiffs alleged that they and other independent pharmacies were forced into a choice between being included in the network and having to accept “unconscionably low” reimbursement rates or leaving the network and losing access to Caremark’s subscribers.²⁷⁰ Caremark filed a Rule 16(c) issue-narrowing motion for the limited purpose of seeking an order from the court that Caremark’s efforts in coordinating the purchase price on behalf of independent pharmacies should be analyzed under the rule of reason rather than the per se rule.²⁷¹ The question of markets or market power was not before the court due to the procedural issues at this stage in the litigation.²⁷²

The district court granted Caremark’s motion and ruled that the plaintiff’s claim should be decided under a rule of reason analysis.²⁷³ The district court determined that Caremark’s collective purchases were not a marked restraint of

262. *Id.*

263. *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

264. *Howard Hess Dental Lab. v. Dentsply Int’l, Inc.*, 424 F.3d 363 (3d Cir. 2005), *cert. denied sub nom. Jersey Dental Labs. Inc. v. Dentsply Int’l, Inc.*, 126 S. Ct. 2320 (2006).

265. *Court Implants*, *supra* note 261.

266. *Id.*

267. *Id.*

268. 385 F. Supp. 2d 740 (N.D. Ill. 2005).

269. *Fisher*, *supra* note 242, at 3.

270. *Id.*

271. *Id.*; *North Jackson Pharmacy*, 385 F. Supp. 2d at 743.

272. *Fisher*, *supra* note 242, at 3.

273. *Id.*; *North Jackson Pharmacy*, 385 F. Supp. 2d at 743.

trade but could create efficiencies appropriate for consideration under the rule of reason.²⁷⁴ The court was influenced by a 2004 report²⁷⁵ in which the FTC and the Department of Justice discussed the procompetitive benefit of PBMs to consumers.²⁷⁶ The report stated that consumers who have a prescription drug insurance plan administered by a PBM enjoy substantial cost savings over cash-paying customers.²⁷⁷

VI. HEALTH INFORMATION PRIVACY AND SECURITY

A. HIPAA Security Rule Effective

In addition to creating regulations for the privacy of protected health information (“PHI”), the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) also mandated the Department of Health and Human Services (“HHS”) to create regulations that govern the security of protected health information (the “Security Standards”).²⁷⁸ The Security Standards define the administrative, physical, and technical safeguards to protect the confidentiality, integrity, and availability of electronic health information (“EHI”). The Security Standards require covered entities to implement basic safeguards to protect EHI from unauthorized access, alteration, deletion, and transmission.

The scope of information covered by the Security Standards is more limited than that of the Privacy Rule. The Privacy Rule applies to protected health information in any form, whereas the Security Standards apply only to protected health information in electronic form.²⁷⁹ The Security Standards’ application is limited to protected health information that is transmitted or maintained by or in electronic media.²⁸⁰ Electronic media includes computer hard drives, magnetic tapes or disks, optical disks, the internet, extranets, leased lines, dial-up lines, private networks, and moving data on floppy disks. Electronic media neither includes facsimiles, telephone transmissions, nor video teleconferencing or messages left on voicemail.²⁸¹

Covered entities must modify their systems to meet the Security Standards. However, they are able to schedule the implementation of the security standards

274. Fisher, *supra* note 242, at 3.

275. DEPARTMENT OF JUSTICE, FEDERAL TRADE COMMISSION, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (2004), available at http://www.usdoj.gov/atr/public/health_care/204694.htm.

276. *North Jackson Pharmacy*, 385 F. Supp. 2d at 750; Fisher, *supra* note 242, at 3.

277. *North Jackson Pharmacy*, 385 F. Supp. 2d at 750.

278. The Centers of Medicare and Medicaid Services within the Department of Health and Human Services promulgated the Security Standards and has enforcement responsibility for the Standards. CMS maintains a website with helpful compliance tools. CMS, Security Materials, http://new.cms.hhs.gov/educationmaterials/04_SecurityMaterials.asp (last visited July 2, 2006).

279. 45 C.F.R. § 164.302 (2005).

280. *Id.*

281. 45 C.F.R. § 160.103.

in a way that best fits their needs. Health care providers and large health plans were required to be compliant with the Security Standards by April 20, 2005.²⁸² Small health plans must meet the Security Standards by April 20, 2006.²⁸³

The Security Standards require covered entities to:

(1) [e]nsure the confidentiality, integrity, and availability of all EPHI the covered entity creates, receives, maintains, or transmits[;] (2) [p]rotect against any reasonably anticipated threats or hazards to the security or integrity of such information[;] (3) [p]rotect against any reasonably anticipated uses or disclosures of such information that are not permitted or required [by the Privacy Rule;] and (4) [e]nsure compliance by workforce members.²⁸⁴

To ensure the security of EPHI, the Security Standards require protections in three general categories: administrative safeguards, physical safeguards, and technical safeguards.²⁸⁵ The Regulations break each of these categories down into various “Standards” that must be achieved.

The administrative safeguard category of the Security Standards details the administrative actions, policies, and procedures to manage the selection, development, implementation, and maintenance of security measures to protect EPHI and to manage the conduct of the covered entity’s workforce in relation to the protection of EPHI.²⁸⁶ The administrative safeguards are broken down into nine standards that must be met: (i) security management process; (ii) assigned security responsibility; (iii) workforce security; (iv) information access management; (v) security awareness and training; (vi) security incident procedures; (vii) contingency plan; (viii) evaluation; and (ix) business associate contracts.²⁸⁷

The second general category under the Security Standards is physical safeguards. “Physical [s]afeguards are [those] physical measures, policies, and procedures to protect a covered entity’s electronic information systems and related buildings and equipment, from natural and environmental hazards, and unauthorized intrusion.”²⁸⁸ To comply with the physical safeguards, a covered entity must achieve four separate standards: (i) facility access controls; (ii) workstation use; (iii) workstation security; and (iv) device and media controls.²⁸⁹

The final category of safeguards for EPHI under the Security Standards is technical safeguards. These safeguards are the technology and the policy and procedures for its use that protect EPHI and control access to it.²⁹⁰ This category

282. 45 C.F.R. §§ 164.318(a)(1), 164.318(c).

283. *Id.* § 164.318(a)(2).

284. 45 C.F.R. § 164.306(a).

285. 45 C.F.R. §§ 164.308, 164.310, 164.312.

286. 45 C.F.R. § 164.304.

287. 45 C.F.R. § 164.308(a)-(b).

288. 45 C.F.R. § 164.304.

289. 45 C.F.R. § 164.310(a)-(d).

290. 45 C.F.R. § 164.304.

is broken down into five standards: (i) access control; (ii) audit controls; (iii) integrity; (iv) person or entity authentication; and (v) transmission Security.²⁹¹

For covered entities to meet the standards, the Security Standards set forth various “Implementation Specifications” (“IS”). Some of the IS are required and some are merely addressable. If an IS is required, a covered entity must implement it to achieve compliance with the standard to which it relates. If the IS is addressable, a covered entity must assess “whether the IS is a reasonable and appropriate way” for a covered entity to meet the Standard given the covered entity’s environment.²⁹²

Each covered entity must decide whether it should implement the addressable IS by taking into account its risk analysis, risk mitigation strategy, what security measures are already in place, and the cost of the implementation. If the addressable IS is reasonable, the covered entity must implement it.²⁹³ If the IS is deemed to be inappropriate or unreasonable, the covered entity must determine whether a reasonable alternative can be implemented. If no reasonable alternative is available, then the covered entity may decide not to implement the addressable IS.²⁹⁴ In both of these latter cases, the entity must document the decision not to implement the addressable specification, the rationale behind the decision, and how the applicable security Standard is otherwise being met.²⁹⁵

B. HIPAA Civil Enforcement

On April 18, 2005, HHS issued Proposed Final Regulations that set forth the HHS’ policies and procedures for enforcing HIPAA.²⁹⁶ HHS’s approach to the Regulations is to provide clear and easy to understand standards that provide consistent results in the interest of fairness and that provide the Secretary of HHS with reasonable discretion. HHS does not intend for the standards to be “overly prescriptive in areas where it would be helpful to gain experience with the practical impact of the HIPAA rule[s] to avoid unintended adverse effects.”²⁹⁷

291. 45 C.F.R. § 164.312(a)-(e).

292. 45 C.F.R. § 164.306(d).

293. *Id.* § 164.306(d)(3)(i)-(ii).

294. *Id.* § 164.306(d)(3)(ii).

295. *Id.*

296. HIPAA Administrative Simplification; Enforcement, 70 Fed. Reg. 20,224 (proposed Apr. 18, 2005) (to be codified at 45 C.F.R. pts. 160 and 164). On April 17, 2003, HHS had previously published an Interim Final Rule establishing the rules of procedure for the imposition of civil money penalties on entities that violate the HIPAA Administrative Simplification standards. Civil Money Penalties: Procedures for Investigations, Imposition of Penalties, and Hearings, 68 Fed. Reg. 18,895 (Apr. 17, 2003) (to be codified at 45 C.F.R. pt. 160). The Interim Final Rule addressed the procedural aspects of imposing civil money penalties such as notices of proposed penalty determinations, discovery procedures, hearing procedures, subpoenas, witnesses, and evidence related to civil money penalty enforcement actions. In contrast, the Proposed Rule discussed in the text above addresses HHS’s enforcement philosophy.

297. HIPAA Administrative Simplification; Enforcement, 70 Fed. Reg. at 20,227.

The regulations would apply the same investigation and penalty process to all violations of HIPAA, whether the violation involves privacy, security, portability, or non-discrimination. In its discussion of the Proposed Regulations, HHS confirms that most investigations are the result of complaints filed by individuals, and HHS emphasizes that “covered entities may not threaten, intimidate, coerce, discriminate against, or take any other retaliatory action” against persons who complain to HHS or persons who cooperate in the enforcement process.²⁹⁸ Although most enforcement actions arise through individual complaints, the Secretary reserves the right to perform random compliance audits.²⁹⁹

Under the Proposed Regulations, if an investigation determines that a HIPAA violation has occurred, HHS will attempt to reach an informal resolution with the covered entity. This generally would involve correction of the problem by the covered entity, or a plan of action to correct the violation. Penalties will not be assessed if an informal resolution is reached.³⁰⁰

If an informal resolution is not reached, HHS will advise the covered entity of its determination and offer the entity an opportunity to provide written evidence and explain any mitigating factors.³⁰¹ If HHS then determines that a penalty is appropriate, it has broad discretion in determining the amount of the penalty. Under the law, penalties may not exceed \$100 per violation, to a maximum of \$25,000 per identical violation per calendar year.³⁰² Because many violations involve multiple instances of the violation, the proposed rule describes how HHS will bundle multiple transactions.³⁰³ In general, the bundling will be done in a manner favorable to the covered entity. If the covered entity disagrees with the penalty imposed by HHS, it is entitled to two administrative appeals, after which it may file in court.³⁰⁴ HHS further noted that if it imposes penalties under its jurisdiction, a covered entity may still be subject to other penalties if its acts have also violated other state or federal laws.³⁰⁵

HHS will not impose a penalty if the violator demonstrates that (a) it did not have knowledge of the violation and would not have been aware of the violation even with reasonable diligence, or (b) the violation was “due to reasonable cause and not willful neglect” and the violation was corrected within thirty days of uncovering the violation (or it will be promptly corrected).³⁰⁶ Furthermore, civil penalties will not be assessed if criminal violations are involved.³⁰⁷ In assessing the penalty, HHS will consider the time period of the violation, the type and

298. *Id.* at 20, 227, 20,251.

299. *Id.* at 20,226.

300. *Id.* at 20,250.

301. Proposed 45 C.F.R. § 160.312(a)(3)(i).

302. Proposed 45 C.F.R. § 160.404(b).

303. Proposed 45 C.F.R. § 160.406.

304. Proposed 45 C.F.R. §§ 160.504, 160.548.

305. Proposed 45 C.F.R. § 160.418.

306. Proposed 45 C.F.R. § 160.410(b).

307. *Id.*

degree of harm to the individual, intent, attempts to rectify the violation, cooperation with the investigation, and the existence or absence of other violations.³⁰⁸

The proposed regulations make it clear that a covered entity can be held civilly liable for the acts and omissions of its employees. A covered entity will not be held responsible for the acts and omissions of its business associates as long as it has received assurances from the business associate that it will safeguard the information it receives.³⁰⁹ With such assurances, there is no duty to monitor the actions of one's business associates, although there is a duty to act if the covered entity is actually aware of a pattern of business associate violations.

When HHS finalizes the proposed regulations, it will notify the general public. There currently is no stated time table for finalization.

C. HIPAA Criminal Enforcement

On June 1, 2005, the Office of Legal Counsel of the U.S. Department of Justice wrote a memorandum expressing its opinion as to whether only covered entities may be criminally liable for violations of HIPAA's privacy and security standards, or if employees and others not directly regulated by the statute may be prosecuted as well.³¹⁰ The opinion concluded that only those entities that are explicitly covered by HIPAA (health plans, health care providers that engage in standard electronic transactions, and health care clearinghouses) may be prosecuted for criminal violations of HIPAA. Specific individuals may be prosecuted only due to their corporate (generally managerial) position, or under conspiracy or aiding and abetting laws.

The criminal penalties under HIPAA are significant: (1) a fine of up to \$50,000 and/or up to one year imprisonment for knowingly using or causing to be used a unique health identifier, or obtaining or disclosing individually identifiable health information about an individual; (2) a fine of up to \$100,000 and/or up to five years imprisonment for violations committed under false pretenses; and (3) a fine of up to \$250,000 and/or up to ten years' imprisonment for violations committed with intent to sell or use the information for commercial advantage, personal gain, or malicious harm.

The memorandum further held that prosecution merely requires that the offender knowingly used, obtained, or disclosed the individually identifiable health information, and not that the offender also knew that using the information violated HIPAA.

308. Proposed 45 C.F.R. § 160.408.

309. 45 C.F.R. § 160.402 (2005).

310. See Scope of Criminal Enforcement under 42 U.S.C. § 1320d-6, Memorandum Opinion for the General Counsel Department of Health and Human Services and the Senior Counsel to the Deputy Attorney General (June 1, 2005), http://www.usdoj.gov/olc/hipaa_final.htm.

D. Other HIPAA Guidance and Developments

During 2005, HHS's Office for Civil Rights ("OCR"—the enforcing Office for the HIPAA Privacy Rule) issued a number of pieces of guidance, principally through Questions and Answers on its website, including confirmation that (1) a health plan may disclose protected health information ("PHI") to a state child support enforcement agency in response to a National Medical Child Support Order; (2) a health care provider may disclose PHI to an interpreter without an individual's authorization when using an interpreter to communicate with an individual; (3) a covered entity may disclose PHI without an individual's authorization to a Protection and Advocacy system when the disclosure is required by law; (4) group health plans (or their health insurers) may disclose PHI without an individual's authorization to plan sponsors for the plan sponsor to provide information required by the Centers for Medicare and Medicaid Services for the purposes of applying for and maintaining the retiree drug subsidy under Medicare Part D; and (5) that broad disclosures of PHI are authorized by the Privacy Rule for purposes of treating the victims and evacuees of Hurricane Katrina.³¹¹

Also, the constitutionality and procedural creation of the Privacy Rule were upheld in a unanimous decision from the United States Court of Appeals for the Third Circuit. In *Citizens for Health v. Leavitt*,³¹² the plaintiffs contended that the Privacy Rule's permissive allowance of the use of individuals' protected health information without their consent for purposes of treatment, payment, and health care operations violated the First and Fifth Amendments to the U.S. Constitution.³¹³ The court disagreed and held that the Privacy Rule (and therefore the government) did not *compel* any disclosure under the Privacy Rule.³¹⁴ The Privacy Rule merely makes such disclosures permissive and any decisions to disclose protected health information were made by individual covered entities.³¹⁵ Therefore, the plaintiffs could not establish sufficient governmental action to maintain constitutional claims.³¹⁶ Further, the court held that the Privacy Rule was legitimately promulgated in compliance with the Administrative Procedures Act and its existence could not be challenged on procedural grounds.³¹⁷ It is likely that this will be one of the last major challenges to the creation of the Privacy Rule.

311. All OCR Questions and Answers and other Hurricane Katrina Guidance discussed in this section may be found at OCR's website, at <http://www.hhs.gov/ocr/hipaa>.

312. 428 F.3d 167 (3d Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3600 (U.S. Apr. 13, 2006) (No. 05-1311).

313. *Id.* at 175.

314. *Id.* at 184.

315. *Id.* at 177.

316. *Id.* at 186.

317. *Id.* at 186-88.

VII. REIMBURSEMENT

A. New Medicare Claims Appeal Process

On March 8, 2005, the Centers for Medicare and Medicaid Services issued its interim final rule regarding changes to the Medicare appeal procedures.³¹⁸ Changes to the Medicare claims appeal process were required by two recent laws, the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (“BIPA”)³¹⁹ and the MMA.³²⁰ The rules set forth the administrative appeal requirements for Medicare carriers, fiscal intermediaries, Qualified Independent Contractors (“QIC”), Administrative Law Judges (“ALJ”), and the Medicare Appeals Council (“MAC”).³²¹

The new Medicare claims appeal process consists of five levels of appeal. First, the Medicare contractor makes an initial determination of the submitted Part A or Part B claim.³²² If a party is dissatisfied with the initial determination, the party may request a redetermination of the claim within 120 days.³²³ The Medicare contractor must issue a decision within sixty days after receiving the request for redetermination.³²⁴ Second, following the Medicare contractor’s redetermination, the party may request reconsideration within 180 days from the date of redetermination with a QIC.³²⁵ The QIC must issue a decision within sixty days.³²⁶ Third, the party may request a hearing with an ALJ.³²⁷ The ALJ will conduct a hearing if the amount in controversy is greater than or equal to \$100 and the request is filed within sixty days of the reconsideration decision. The ALJ must issue a decision within ninety days. Fourth, the party may request the MAC to review the case if the request is filed within sixty days.³²⁸ The MAC must issue a decision within ninety days. Finally, the party may file in federal district court if the amount in controversy is greater than or equal to \$1000 and the request is filed within sixty days of the MAC’s decision.³²⁹ The new Medicare claims appeal process is effective May 1, 2005, for Part A claims and January 1, 2006, for Part B claims.

318. Medicare Program: Changes to Medicare Claims Appeal Procedures, 70 Fed. Reg. 11,420 (Mar. 8, 2005) (to be codified at 42 C.F.R. pts. 401 and 405).

319. Pub. L. 106-554 § 521 (2000).

320. Pub. L. 108-173, 117 Stat. 2066 (Dec. 8, 2003).

321. Medicare Program: Changes to Medicare Claims Appeal Procedures, 70 Fed. Reg. at 11,420-11,467.

322. 42 C.F.R. § 405.921 (2005).

323. 42 C.F.R. § 940-942.

324. 42 C.F.R. § 405.940-958.

325. 42 C.F.R. §§ 405.960-978.

326. 42 C.F.R. § 405.966.

327. 42 C.F.R. §§ 405.1000-1054.

328. 42 C.F.R. § 405.1102.

329. 42 C.F.R. § 405.1136(e).

B. Pay for Performance ("P4P") Initiatives

Medicare is developing various initiatives to encourage quality improvement in the care of Medicare beneficiaries. Pay for Performance ("P4P") Initiatives are targeted at all health care settings where Medicare beneficiaries receive their health care, including hospitals, physicians' offices, ambulatory care facilities, nursing homes, home health care agencies, and dialysis facilities.³³⁰ P4P initiatives reward health care providers through incentive payments for, among other things, improving the quality, efficiency, and coordination of care. Pilot P4P Initiatives are currently being tested, including the Hospital Quality Initiative, the Physician Group Practice Demonstration, and the Chronic Care Improvement Program.³³¹

C. Emergency Health Services for Undocumented Aliens

Undocumented aliens' use of medical services and the resulting unreimbursed costs associated with furnishing emergency health services to undocumented aliens has been a long-standing issue for hospitals and other emergency providers.³³² Pursuant to the Emergency Medical Treatment and Labor Act ("EMTALA"), hospitals participating in Medicare are required to medically screen all persons seeking emergency care and provide the treatment necessary to stabilize those who have an emergency condition, regardless of payment method or insurance status.³³³ Furnishing care to undocumented aliens has left hospitals and other emergency providers, especially those on border states or with high populations of undocumented aliens, with large amounts of unreimbursable care costs.

Recognizing this problem, Section 1011 of the MMA provides \$1 billion through 2008 to help hospitals and other emergency health care providers recoup some of the unreimbursed cost.³³⁴ Section 1011 provides \$250 million per year for fiscal years 2005 through 2008.³³⁵ Two-thirds of the funds will be divided among the fifty states and the District of Columbia. The remaining one-third will be divided among the six states with the largest number of undocumented alien apprehensions. Payments will be made directly to hospitals, certain physicians, and ambulance providers for the unreimbursed costs of providing services under EMTALA. Section 1011 funds can be used to cover all medically necessary and appropriate services furnished to undocumented aliens who received emergency services required by EMTALA and any related hospital inpatient, outpatient, and ambulance services.³³⁶

330. CMS, Fact Sheet: Medicare "Pay for Performance (P4P)" Initiatives (Jan. 31, 2005), available at <http://www.cms.hhs.gov/media/press/release.asp?Counter=1343>.

331. *Id.*

332. *Cf.* Pub. L. 108-173, § 1011, 117 Stat. 2066 (Dec. 8, 2003).

333. 42 U.S.C. § 1395dd (2000).

334. Pub. L. 108-173, § 1011, 117 Stat. 2066 (Dec. 8, 2003).

335. *Id.*

336. *Id.*

D. Medicare Payment System Changes

Over the past year there have been a few significant changes to the Medicare payment system. First, on November 3, 2004, CMS announced a new Medicare prospective payment system (“PPS”) final rule for inpatient psychiatric facilities (“IPFs”), which will replace the cost-based payment system on or after January 1, 2005.³³⁷ Next, on May 19, 2005, CMS proposed a payment increase for inpatient rehabilitation facilities to more accurately reflect the costs of rehabilitation services.³³⁸ Finally, on August 26, 2005, CMS published a final rule regarding Medicare coverage of power mobility devices (“PMDs”), which include power wheelchairs and power operated vehicles, to address inflated and falsified billing.³³⁹ The final rule sets forth revised conditions for Medicare payment of PMDs, denying payment for motorized or power wheelchair unless a physician or a physician assistant, nurse practitioner, or clinical nurse specialist has conducted a face-to-face examination of the beneficiary and has written a prescription for the item.³⁴⁰

E. Medicaid DSH Payments

On August 26, 2005, CMS published a proposed rule which would implement section 1001(d) of the MMA, which requires states to report additional information about their Disproportionate Share Hospital (“DSH”) programs.³⁴¹ Under the proposed rule, each state must submit an annual report that includes: (1) hospital name; (2) Medicare provider number; (3) Medicaid provider number; (4) type of hospital; (5) type of hospital ownership; (6) Medicaid inpatient utilization rate; (7) low income utilization rate; (8) disproportionate share hospital payments; (9) regular Medicaid rate payments; (10) Medicaid managed care organization payments; (11) supplemental/enhanced Medicaid payments; (12) indigent care revenue; (13) transfers; (14) total cost of care; (15) uncompensated care costs; and (16) Medicaid eligible and uninsured individuals receiving services.³⁴²

The proposed rule also requires each state to have its DSH payment program independently audited. The audit must verify:

337. CMS, Medicare Announces New Payment System for Inpatient Facilities (Nov. 3, 2004), <http://www.cms.hhs.gov/media/press/release.asp?Counter=1252>.

338. CMS, CMS Proposes Payment Increases, Policy Refinements for Inpatient Rehabilitation Facilities (May 19, 2005), <http://www.cms.hhs.gov/media/press/release.asp?Counter=1464>.

339. Medicare Program; Conditions for Payment of Power Mobility Devices, Including Power Wheelchairs and Power-Operated Vehicles, 70 Fed. Reg. 50,940 (Aug. 26, 2005) (to be codified at 45 C.F.R. pt. 410).

340. *Id.* at 50,946.

341. Medicaid Program; Disproportionate Share Hospital Payments, 70 Fed. Reg. 50,262 (Aug. 26, 2005) (to be codified at 42 C.F.R. pts. 447 and 455).

342. *Id.* at 50,267-50,268.

[(1) t]he extent to which hospitals in the [s]tate have reduced uncompensated care costs to reflect the total amount of claimed expenditures made under Section 1923 of the Act, . . . [(2)] DSH payments to each hospital comply with the applicable hospital-specific DSH payment limit[; (3) o]nly the uncompensated care costs of providing inpatient and outpatient hospital services to Medicaid eligible individuals and uninsured individuals as described in Section 1923(g)(1)(A) of the Act are included in the calculation of the hospital-specific limits[; (4)] the [s]tate included all Medicaid payments, including supplemental payments, in the calculation of such hospital-specific limits[; and (5) t]he [s]tate has separately documented and retained a record of all its costs under the Medicaid program, claimed expenditures under the Medicaid program, uninsured costs in determining payment adjustments under Section 1923 of the Act, and any payments made on behalf of the uninsured from payment adjustments under Section 1923 of the Act.³⁴³

“Federal matching payments are contingent upon a state’s annual submission of both the annual DSH report and the independent certified audit.”³⁴⁴

VIII. LABOR AND EMPLOYMENT

A. *Fair Labor Standards Act (“FLSA”)*

The Department of Labor (“DOL”) has issued numerous opinion letters in the past year in an attempt to clarify the FLSA overtime regulations issued in 2004, a couple of which involve hospitals and health care systems.

1. *Overtime for “Joint Employees” of Health Care System—FLSA Opinion Letter 2005-15.*—On April 11, 2005, the DOL issued an opinion letter in response to a question from a health care system about its obligation to pay overtime under the FLSA.³⁴⁵ The health care system had a nurse who held positions at two different companies within the system. Based on a review of the facts provided, the DOL determined that the health care system had to pay overtime to the nurse if the nurse’s *combined* hours at the two employers exceeded forty hours in a workweek.³⁴⁶

The DOL’s determination was based on its interpretation of the joint employer regulations, which state that “an employee who performs work that simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek,” generally will be jointly employed “where the employers are not completely disassociated with respect

343. *Id.* at 50,268.

344. *Id.*

345. U.S. Department of Labor, FLSA Opinion Letter 2005-12 (Apr. 12, 2005) [hereinafter FLSA 2005-12].

346. *Id.*

to the employment of the particular employee and may be deemed to share control of the employee, directly or indirectly, by reason that one employer controls, is controlled by, or is under common control with the other employer.”³⁴⁷ Pursuant to these regulations, if the companies have common control, especially in personnel matters, the DOL will treat them as the same company for employment-related purposes.

The DOL’s recent opinion highlights the fact that separating personnel functions may not be enough to avoid being joint employers. Each entity within the health care system that requested the opinion had its own human resources department, employee handbook, payroll system, and retirement plan. There was no regular interchange of employees between the entities. In addition, each entity had its own federal identification number.³⁴⁸ Nonetheless, the DOL still found that they were joint employers.

The DOL looked at the fact that the two entities shared a common president and board of directors. It also noted that one human resources department occasionally provided administrative support to the other, the Senior Vice President of Human Resources and several other senior executives and managers had responsibility for more than one entity within the system, non-union employees had common health care plans, and job openings were posted within the system. Additionally, the DOL considered the fact that some of the personnel policies were the same (although apparently in different handbooks), such as the FMLA, anti-harassment, and anti-nepotism policies. Because of these “multiple associations,” the DOL found that both employers were responsible for combining the hours an employee worked at both entities for purposes of calculating overtime.³⁴⁹

The joint employer analysis is extremely fact-sensitive—several factors need to be considered and each relationship has to be reviewed separately. To avoid being a joint employer, companies need to remain as separate as possible, and stay away from “multiple associations,” similar to those found by the DOL in this recent opinion letter. If related companies wish to take advantage of each other’s expertise or the cost effectiveness of combined insurance plans, they should understand the legal consequences, which may reach far beyond the calculation of hours worked by an employee who works for both companies.

2. *Exempt Status of Nurse Practitioners—FLSA Opinion Letter 2005-20.*—The DOL issued another opinion letter on August 19, 2005, that is directly applicable to the health care industry.³⁵⁰ FLSA Opinion Letter 2005-20 addressed two issues. The first issue was whether having some Nurse Practitioners who were treated as non-exempt because they worked on an as-needed basis and were paid hourly for their work would invalidate the exemption from overtime for the remainder of the Nurse Practitioners who performed the

347. 29 C.F.R. § 791.2(b)-(b)(3) (2005).

348. FLSA 2005-12, *supra* note 345.

349. *Id.*

350. U.S. Dep’t of Labor, FLSA Opinion Letter 2005-20 (Aug. 19, 2005) [hereinafter FLSA 2005-20].

same duties as the PRN Nurse Practitioners, but were paid on a salaried basis.³⁵¹ The DOL took the position that having some employees who are treated as exempt within the same job classification, and performing the same duties, as others who are paid on an hourly basis does *not* affect the exempt status of the other employees.³⁵² This assumes that those who are considered exempt truly meet the duty and salary basis requirements necessary for the exemption.³⁵³

The second issue addressed by the Opinion Letter was whether paying otherwise exempt employees a shift differential for working evenings and weekends affects their salary basis, and therefore invalidates the exemption. The DOL's opinion is that the predetermined amount of salary necessary to support an exemption need not include *all* of the compensation that the employee will be paid.³⁵⁴ Further, the exemption is not lost if an employee who is paid the proper salary also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional amounts of compensation may be paid on any basis (e.g., flat amount, bonus, straight-time hourly amount, time and one-half of a calculated hourly amount, paid time off, etc.).³⁵⁵ Accordingly, the DOL opinion was that an otherwise exempt employee may be paid an "overtime premium" or a shift differential without invalidating the otherwise exempt status.³⁵⁶

B. Exclusive Remedy of Worker's Compensation:
Jennings v. St. Vincent Hospital and Health Care Center

The Indiana Court of Appeals issued a decision in 2005 reaffirming that employees working for health care facilities through a staffing agency will be considered employees of both entities and will be subject to the exclusive remedies provisions in the Worker's Compensation Act.³⁵⁷ Jennings was a registered nurse who specialized in emergency room care.³⁵⁸ He was employed by StarMed, a company that assigned healthcare workers to hospital facilities on

351. Although the Opinion Letter did not specifically state, it was presumed that the exemption for the Nurse Practitioners was the professional exemption. The DOL regulations regarding the professional exemption can be found at 29 C.F.R. § 541.300 (2005).

352. See 29 C.F.R. § 541.2 (stating that exemptions are not based on job title or classification, but rather upon the salary and duties of the individual employee).

353. See 29 C.F.R. pt. 541.

354. The DOL relied on 29 C.F.R. § 541.602, which states that an employee is compensated on an salaried basis "if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting *all or part* of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.602 (emphasis added).

355. See 29 C.F.R. § 541.604(a) (2005).

356. FLSA 2005-20, *supra* note 350.

357. IND. CODE § 22-3-2-2 (2005).

358. *Jennings v. St. Vincent Hosp. & Health Care Ctr.*, 832 N.E.2d 1044, 1048 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App. 2005), *trans. denied* (Ind. 2006).

a temporary basis. In 1992, StarMed contracted with St. Vincent to provide St. Vincent with nurses for temporary staffing needs. Jennings was assigned by StarMed to work at St. Vincent from December 11, 1999, to March 9, 2000.³⁵⁹

On March 7, 2000, Jennings allegedly contracted Hepatitis C after being stuck by an angiocatheter while performing nursing duties at the emergency room at St. Vincent Hospital.³⁶⁰ Jennings filed a claim for worker's compensation benefits against StarMed. He also filed a civil suit against St. Vincent claiming negligence. St. Vincent responded with a motion to dismiss based on lack of subject matter jurisdiction, claiming that Jennings was a co-employee of St. Vincent and StarMed, thus invoking the protection of the exclusive remedy provision of the Worker's Compensation Act.³⁶¹ Under this provision, an injured employee is entitled to worker's compensation benefits only, and may not sue the employer for damages. The trial court granted St. Vincent's motion, and Jennings appealed that determination.³⁶²

In upholding the trial court's decision, the court begrudgingly³⁶³ determined that Jennings was a co-employee of St. Vincent and StarMed.³⁶⁴ The Worker's Compensation Act explicitly recognizes that a worker may have more than one employer at a given moment.³⁶⁵ To determine whether a worker was engaged in a joint employment situation, seven factors must be evaluated and weighed as a balancing test.³⁶⁶ The factors include: "(1) the right to discharge; (2) mode of payment; (3) supplying tools or equipment; (4) belief of the parties in the existence of an employer-employee relationship; (5) control over the means used in the results reached; (6) length of employment; and (7) establishment of the work boundaries."³⁶⁷

After analyzing each factor, the court determined that St. Vincent's right to discharge Jennings, the tools and equipment that St. Vincent supplied Jennings, and, most importantly, its control over Jennings's performance of his duties led to the conclusion that Jennings was a co-employee of St. Vincent and StarMed.³⁶⁸ Weighing against this determination were the belief of the parties in the existence

359. *Id.*

360. *Id.* at 1049.

361. IND. CODE § 22-3-2-2.

362. *Jennings*, 832 N.E.2d at 1049.

363. The court urged the legislature to act to address the given situation stating that a "deficiency in our current system of worker's compensation" exists. *Id.* at 1047. The court did not note that in 2001, the Indiana General Assembly amended IND. CODE § 22-3-6-1(a), the definition of an "employer" to state, "Both a lessor and a lessee of employees shall each be considered joint employers of the employees provided by the lessor to the lessee for purposes of [IND. CODE §] 22-3-2-6 and [IND. CODE §] 22-3-3-31." See *Jennings*, 832 N.E.2d at 1050; IND. CODE § 3-6-1(2).

364. *Jennings*, 832 N.E.2d at 1055.

365. IND. CODE § 22-3-3-31; *Jennings*, 832 N.E.2d at 1050.

366. *Jennings*, 832 N.E.2d at 1050-51.

367. *Id.*

368. *Id.* at 1051-54.

of an employer-employee relationship and length of employment factors.³⁶⁹ The court found that the mode of payment factor was not determinative.³⁷⁰ Because the more significant factors weighed in favor of an employer-employee relationship, the court concluded that both StarMed and St. Vincent were employers protected by the exclusive remedy provision.

C. Immigration

1. J-1 Waivers for Foreign Medical Graduates.—Routinely, foreign medical graduates (“FMGs”) enter the United States on temporary J-1 exchange visitor visas to complete graduate medical education and/or training in this country. Upon completion of such programs (often medical residency and fellowship training), the FMG must return home to satisfy a two-year home residency requirement before becoming eligible for any other visa category or lawful permanent residence.³⁷¹ Not surprisingly, many FMGs seek a waiver of their home residency requirement to pursue employment opportunities in the United States.³⁷² One waiver option is the “Conrad 30” program which allows each state health department to grant thirty such waivers to FMGs.³⁷³ In exchange, the FMG must agree to practice medicine for three years in a designated healthcare shortage area. Once the two-year home residency requirement of the J-1 visa status is waived, the physician is able to pursue other immigration options, including sponsorship for H-1B visa status and eventually lawful permanent residence.³⁷⁴ On December 3, 2004, the President signed legislation that extended the “Conrad 30” J-1 waiver program for foreign-born physicians to June 1, 2006.³⁷⁵ The Act also included a number of other important changes related to J-1 waivers, such as permitting doctors to practice in either primary care or specialty medicine. Historically, such waivers were targeted for physicians practicing primary care only. Under the new law, a specialist may qualify if there is a demonstrated shortage of doctors able to provide the medical specialty in the designated geographical area.³⁷⁶ Additionally, five of each state’s thirty waivers may be granted to a doctor who practices in areas not designated as underserved if the doctor receiving the waiver practices in facilities that serve

369. *Id.* at 1052.

370. *Id.* at 1051.

371. 8 U.S.C. §1182(e) (2000).

372. Per 8 U.S.C. § 1184(l), any federal agency or state health department may serve as an interested government agency and request a waiver on behalf of a FMG.

373. The “Conrad” program was originally enacted as a part of The Immigration and Nationality Technical Corrections Act of 1994 at § 220, Pub. L. No. 103-416, 108 Stat. 4305 (codified at 8 U.S.C. § 1184(l)).

374. 8 U.S.C. § 1182(e).

375. Pub. L. No. 108-441, 118 Stat. 2630 (codified at 8 U.S.C. §§ 1182 and 1184) (improving access to physicians in medically underserved areas).

376. *Id.*

patients who reside in shortage areas.³⁷⁷ This may permit providers in counties with less than a “whole county” Health Professional Shortage Area (“HPSA”) or Medically Underserved Area (“MUA”) designation to qualify as a waiver sponsor. Finally, physicians sponsored for a waiver by either a federal or state agency are exempt from the H-1B cap, discussed more thoroughly below.³⁷⁸ Under the prior law, only physicians receiving a waiver under the Conrad program were exempt from the cap.³⁷⁹

2. *H-1B Annual Quota*.—Although not exclusively affecting the healthcare industry, the current annual quota of 65,000 on the number of H-1B visas³⁸⁰ has caused considerable difficulty for many employers. Employers in the healthcare industry regularly utilize the H-1B visa category to sponsor foreign physicians and other health care workers.³⁸¹ The Fiscal Year 2006 H-1B cap was reached weeks prior to the start of the fiscal year on October 1, 2005.³⁸² Enacted December 3, 2004, the H-1B Visa Reform Act of 2004 did not directly raise the annual cap, however, additional foreign nationals are now exempt from the 65,000 annual limitation.³⁸³ For instance, 20,000 visas have been set aside for foreign nationals with a Master’s or higher degree from a U.S. institution of higher education.³⁸⁴ Foreign nationals with offers to work at institutions of higher education or related or affiliated non-profit entities³⁸⁵ and those who already have been counted against the cap continue to be exempt from the numerical cap.³⁸⁶ Unfortunately, the current quota still has not been sufficient to meet the demand for H-1B professionals, and new legislation to further increase and extend the quota will be the subject of continuing debate.

3. *Lawful Permanent Residence*.—Frequently employers, including those in the healthcare industry, choose to sponsor valued foreign national employees for lawful permanent residence or green card status. An important change affecting

377. *Id.*

378. *Id.*

379. 8 U.S.C. § 1184(l)(2)(A).

380. *Id.* § 1184(g)(1)(A).

381. The H-1B visa category is only available to individuals working in “specialty occupations” which is generally interpreted to mean the position must require a minimum of baccalaureate level education in a particular discipline and the applicant must meet that degree requirement. *Id.* § 1184(i)(1). As such, most nursing positions do not qualify for H-1B classification.

382. Press Release, U.S. Dep’t of Homeland Sec., Citizenship and Immigration Servs., USCIS Reaches H-1B Cap (Aug. 12, 2005) (on file with author).

383. L-1 Visa and H-1B Visa Reform Act, Pub. L. No. 108-447, 118 Stat. 2809 (codified at 8 U.S.C. §§ 1182, 1184, 1356 and 42 U.S.C. § 1869 (2005)). In addition, the \$1000 fee has been made permanent and raised to \$1500 along with the creation of a new \$500 Fraud Prevention and Detection Fee. *Id.*

384. *Id.*

385. Non-profit health care entities with formal affiliations with institutions of higher education may qualify for an exemption from the cap.

386. 8 U.S.C. § 1184(g).

this process is the publication of the Department of Labor's Final Regulations on the Labor Certification for the Permanent Employment of Aliens in the United States and Implementation of a New "PERM" System.³⁸⁷ Effective March 28, 2005, this new system has dramatically affected the labor certification process which is often the initial requirement for permanent residence based on an offer of employment.³⁸⁸ Most significantly, it has altered the prevailing wage system utilized by the Department of Labor, transitioned the labor certification application to an electronic, on-line filing process, and provided a clear sequence of recruitment requirements for the testing of the U.S. labor market in determining whether any qualified U.S. workers are available for the work offered to the foreign national.³⁸⁹

IX. LONG-TERM CARE

The Centers for Medicare and Medicaid Services implemented a provision of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 regarding hospital discharge planning for patients who require post-hospital extended care services.³⁹⁰ The portions of the rule that most affect long-term care facilities require that hospitals include in a patient's discharge plan lists of Home Health Agencies ("HHAs") or skilled nursing facilities ("SNFs") that are available to the patient, in the appropriate geographic area, and participate in the

387. Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 69 Fed. Reg. 77,326 (Dec. 27, 2004) (codified at 20 C.F.R. pts. 655 and 656).

388. Importantly, the Department of Labor has long recognized nursing and physical therapy as job shortage areas. These occupations are designated as Schedule A, Group 1 at 20 C.F.R. § 656.5 and are exempt from the rigors of labor market testing. However, these labor certifications must be filed with Citizenship and Immigration Services (not DOL) and follow the labor certification requirements outlined in the amended PERM rule at 20 C.F.R. § 656.15. For Schedule A, Group I filings, the principal changes concern filing of the new form ETA 9089, Application for Permanent Employment Certification, and complying with the changes in the prevailing wage system and internal posting notice obligations. Additionally, in response to the new PERM regulations, Citizenship and Immigration Services also revised their internal policy memoranda with respect to Schedule A applications received before and after the effective date of the PERM regulation. Interoffice Memorandum from William R. Yates to Regional Directors, et. al., USCIS Revises Guidance Memorandum Describing New Schedule A Requirements, Doc. No. 05101267 (Sept. 23, 2005) (available through the American Immigration Lawyers Association, www.aila.org). Recently, CIS announced that it is considering additional revisions to the posting notice requirements for roving employees or employees whose work site is not yet defined. AILA-SCOPS Q&A Regarding Schedule A Posting Requirements, Doc. No. 05122162 (Dec. 19, 2005) (available through the American Immigration Lawyers Association, www.aila.org).

389. Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 69 Fed. Reg. 77,326.

390. 42 C.F.R. § 482.43 (2005).

Medicare program.³⁹¹ The patient or the patient's family must be informed of their right to choose from among the providers listed, and the discharging hospital must not favor particular providers or limit the patient's choice.³⁹² If the patient is enrolled in a managed care organization, the lists must indicate what providers or services have a contract with the organization.³⁹³ Finally, the hospital must disclose those providers in which it has a disclosable financial interest, and providers that have such an interest in the hospital.³⁹⁴

The Drug Enforcement Agency ("DEA") issued a regulation designed to address the accumulation of surplus controlled substances at long term care facilities.³⁹⁵ The DEA recognized that many long term care facilities ("LTCFs"), which are not DEA registrants, receive a resident's entire dosage of a controlled substance, dispense it daily, and must dispose of excess when residents leave the facility or change their medication.³⁹⁶ To alleviate this problem, the DEA issued a final rule permitting pharmacies to establish automated dispensing systems ("ADS") in LTCFs.³⁹⁷ "The pharmacy stores bulk drugs in the machine . . . and controls the ADS remotely. . . . Only authorized staff of the LTCF would have access to [the machine's] contents."³⁹⁸ Drugs "are not considered dispensed until the system provides them, [so] drugs in the ADS are counted as pharmacy stock. . . . If patients do not take all of the drugs prescribed, the excess can be dispensed to other patients."³⁹⁹

The Department of Health and Human Services issued a regulation addressing the notice given to residents and visitors of a nursing facility ("NF") or skilled nursing facility regarding nursing levels.⁴⁰⁰ This regulation requires NFs and SNFs to post the "number of hours worked by . . . licensed and unlicensed nursing staff who are directly responsible for resident care[.]" reflecting the number and type of staff per shift and calculating the total number of hours worked.⁴⁰¹ Licensed staff includes registered nurses ("RNs"), licensed practical nurses ("LPNs"), or licensed vocational nurses.⁴⁰² Certified nurses

391. *Id.* § 482.43(c)(6).

392. *Id.* § 482.43(c)(7).

393. *Id.* § 482.43(c)(6)(ii).

394. *Id.* § 482.43(c)(8).

395. Preventing the Accumulation of Surplus Controlled Substances at Long Term Care Facilities, 70 Fed. Reg. 25,462 (May 13, 2005) (to be codified at 21 C.F.R. pts. 1300, 1301, 1304, 1307).

396. *Id.*

397. *Id.* at 25,462-25,464.

398. *Id.* at 25,462.

399. *Id.*

400. Medicare and Medicaid Programs; Requirements for Long Term Care Facilities; Nursing Services; Posting of Nurse Staffing Information, 70 Fed. Reg. 62,065 (Oct. 28, 2005) (to be codified at 42 C.F.R. pt. 483).

401. *Id.* at 62,072.

402. *Id.*

aides (“CNAs”), as defined by state law, would constitute unlicensed staff.⁴⁰³ “Direct resident care includes, but is not limited to . . . assisting with activities of daily living, performing gastro-intestinal feeds, giving medications, supervising the care given by CNAs, and performing nursing assessments to admit residents or notify physicians about a change in condition.”⁴⁰⁴

X. INDIANA LEGISLATIVE CHANGES

A. *Physician Disclosure of Financial Interests*

House Bill 1306, effective July 1, 2005, requires a physician to provide certain information to an individual before referring the individual to a health care entity in which the physician has a financial interest.⁴⁰⁵ Specifically, a physician must disclose in writing to the individual that the physician has a financial interest in the health care entity and inform the individual in writing that the individual may choose to be referred to another health care entity, before the physician may refer an individual to a health care entity in which the physician has a financial interest.⁴⁰⁶ The physician must keep a copy of the notice signed by the individual.⁴⁰⁷ However, the above does not apply if a delay in treatment caused by compliance with the requirements would reasonably be excepted by the referring physician to jeopardize the individual’s health, impair the individual’s bodily functions, or cause dysfunction of a bodily organ or part of an individual.⁴⁰⁸ Compliance with these requirements is a condition of physician licensure under Indiana Code section 25-22.5.⁴⁰⁹

B. *Health Entity Construction Projects*

Under House Bill 1330, before the owner of a hospital or proposed hospital may begin a construction project that is estimated by the hospital to cost at least \$10 million or an ambulatory or proposed outpatient center may begin construction that is estimated to cost at least \$3 million the owner must hold at least two public hearings concerning the construction project and publish notice of each hearing at least ten days before the hearing is held.⁴¹⁰

This Bill does not apply to any construction project begun prior to July 1, 2005.⁴¹¹ Additionally, notwithstanding the hearing, a statement or question regarding a construction project or an objection to a construction project that

403. *Id.*

404. *Id.*

405. H.B. 1306, 2005 Reg. Sess., 114th Gen. Assemb. (Ind. 2005) (codified at IND. CODE § 25-22.5-11-5).

406. IND. CODE § 25-22.5-11-3(a) (2005).

407. *Id.* § 25-22.5-11-3(a).

408. *Id.* § 25-22.5-11-3(b).

409. *Id.* § 25-22.5-11-4.

410. *Id.* § 16-21-2-11.5(d).

411. *Id.* § 16-21-2-11.5(c)(2).

arises during a hearing may not cause a delay in or a denial of the issuance of a license.⁴¹²

C. Health Related Information Disclosure

Under Senate Bill 293, a covered entity may disclose certain “protected health information” to a law enforcement official who requests the protected health information for the purpose of identifying or locating a missing person.⁴¹³ The protected health information allowed to be disclosed includes contact information and previous addresses of the individual’s family, personal representative, and friends.⁴¹⁴

D. Health and Hospital Corporation

Several sections of House Bill 1553 made changes to various duties of the Health and Hospital Corporation of Marion County and the Corporation’s Board, including removing certain residency requirements of the Board members and allowing Board members to waive compensation.⁴¹⁵ Moreover, this bill also provided the division of public health with the powers and duties of a local department of health.⁴¹⁶

E. Home and Community Based Services

House Bill 1069 voided rules adopted by the Division of Disability, Aging, and Rehabilitative Services (“DDARS”) for home and community based services (“HCBS”).⁴¹⁷ The bill required DDARS to adopt new rules implementing the caretaker support program and standards for continuum of care providers by January 1, 2006.⁴¹⁸ DDARS, in adopting the new rules, must consult with certain interested persons to ensure that the new rules protect consumers of HCBS, address the specific needs of distinct populations of consumers, do not create barriers to HCBS by imposing certain costs and requirements on providers, and comply with the requirements of the statutes establishing long term care services and the community and home options to institutional care for the elderly and disabled (“CHOICE”) program.⁴¹⁹

F. Personal Service Agencies, Prescription Drugs, and Health Professions

Sections of House Bill 1098 made changes to several different statutes. First, House Bill 1098 established a program for the licensing and regulation of

412. *Id.* § 16-21-2-11.5(h).

413. *Id.* § 16-39-10-4.

414. *Id.*

415. *Id.* § 16-22-8-9; *id.* § 16-22-8-15.

416. *Id.* § 16-22-8-28.

417. H.B. 1069.1.5, 2005 Reg. Sess., 114th Gen. Assemb. (Ind. 2005) (voiding 460 IAC 1.1).

418. IND. CODE § 12-10.5-1-4(b).

419. *Id.* § 12-10.5-1-9; *id.* § 12-10.5-2-3.

personal service agencies.⁴²⁰ The Bill required “a personal services agency[] to obtain a license from the state health commissioner” in order to operate a personal services agency.⁴²¹ Operating a personal services agency without a license is a Class A misdemeanor.⁴²² The Bill also established an act governing home care services and required a placement agency to provide the home care services consumer with certain information when a home care services worker is placed in the consumer’s home, including the worker’s criminal history report.⁴²³ The State Department of Labor may impose a civil penalty against a placement agency for failing to provide a consumer with the required consumer notice or worker notice at the times required by the statute.⁴²⁴

Additionally, House Bill 1098 amended the statute governing the regulation of pharmacists and pharmacies to require the Board of Pharmacy to establish procedures to ensure that pharmacies may return expired prescription drugs to wholesalers and manufacturers and specified the information that the Board must consider in establishing such procedures.⁴²⁵ Moreover, the Bill expanded the requirements that must be met by a wholesale drug distributor for eligibility for licensure and specified prohibited acts, including certain criminal acts related to wholesale drug distribution and legend drugs.⁴²⁶

Finally, House Bill 1098 substantially revised the statute governing speech pathologists and audiologists by, among other things, requiring licensure of speech-language pathology aides, associates, and assistants and amending the licensure requirements of speech-language pathologists and audiologists.⁴²⁷

420. *Id.* §§ 16-27-4-1 to -23.

421. *Id.* § 16-27-4-6(a).

422. *Id.* § 16-27-4-23.

423. *Id.* §§ 22-1-5-1 to -19.

424. *Id.* § 22-1-5-19.

425. *Id.* § 25-26-13-4(b)(3).

426. *Id.* § 25-26-14.

427. *Id.* § 25-35.6-1-1 to -10.

SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

RICHARD K. SHOULTZ*

During this survey period,¹ the Indiana appellate courts decided a number of cases involving insurance questions in the automobile, general liability, and homeowners areas of coverage. An issue receiving a great deal of attention was the insurer's duty of good faith ("bad faith") owed to its insured and whether that duty was breached in different circumstances. This article addresses the decisions of the past year and analyzes their effect upon the practice of insurance law.²

I. AUTOMOBILE CASES

A. *Automobile Policy's "Collision" Coverage Does Not Include Diminished Value of Vehicle After Repair, but May Provide Coverage Under Uninsured/Underinsured Motorist Coverage*

In the last survey article on insurance law,³ two court of appeals decisions⁴ addressed for the first time a question of whether a vehicle's diminished value after repairs should be covered. When an automobile has been involved in an accident, the insured and the insurer must decide whether the damaged automobile must be repaired or considered a total loss (i.e., whether the costs to repair are more than the car's fair market value). Under most standard insurance policies, the insurer agrees to pay the lesser between the amount needed to repair

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1. The survey period for this Article is approximately October 1, 2004 to October 31, 2005.

2. Other cases during the survey period that are not addressed in this Article include *Woodring v. Culbertson*, 227 F.R.D. 290 (N.D. Ind. 2005) (holding underinsured motorist carrier has right to intervene in insured's lawsuit even if it destroys diversity); *Armstrong Cleaners, Inc. v. Erie Insurance Exchange*, 364 F. Supp. 2d 797 (S.D. Ind. 2005) (involving conflict of interest between insurer and holding insured entitled to selection of own defense counsel); *Safety National Casualty Co. v. Cinergy Corp.*, 829 N.E.2d 986 (Ind. Ct. App.) (holding excess insurer entitled to arbitrate coverage issues), *trans. denied*, 841 N.E.2d 986 (Ind. 2005); *Woodley v. Fields*, 819 N.E.2d 123 (Ind. Ct. App.) (holding insurer did not engage in bad faith by delaying settlement until insureds submitted documentation of claim), *reh'g denied* (Ind. Ct. App. 2004), *vacated sub nom. All State Insurance Co. v. Fields*, 842 N.E.2d 804 (Ind. 2006); *Amerisure, Inc. v. Wurster Construction Co.*, 818 N.E.2d 998 (Ind. Ct. App. 2004) (involving commercial liability insurer that did not insure for repair and replacement of faulty workmanship), *clarified on reh'g*, 822 N.E.2d 1115 (Ind. Ct. Ap. 2005); *Barclay v. State Auto Insurance Cos.*, 816 N.E.2d 973 (Ind. Ct. App. 2004) (finding wife to be insured under husband's policy, despite exclusion), *trans. denied sub nom. Newton v. State Auto Insurance Cos.*, 831 N.E.2d 745 (Ind. 2005).

3. Richard K. Shoultz, *Survey of Recent Developments in Insurance Law*, 38 IND. L. REV. 1163 (2005).

4. *Dunn v. Meridian Mut. Ins. Co.*, 810 N.E.2d 739 (Ind. Ct. App. 2004), *vacated*, 836 N.E.2d 249 (Ind. 2005); *Allgood v. Meridian Sec. Ins. Co.*, 807 N.E.2d 131 (Ind. Ct. App.), *aff'd on reh'g*, 812 N.E.2d 1065 (Ind. Ct. App. 2004), *vacated*, 836 N.E.2d 243 (Ind. 2005).

and the automobile's fair market value.⁵ If the insurer agrees to pay for the repair of the automobile, an insured often contends that the vehicle's value is diminished from its pre-accident condition. These two decisions ruled that the diminished value was a loss covered under an automobile policy.⁶ During this survey period, the Indiana Supreme Court reviewed each of these decisions and found that a vehicle's diminished value was not covered under a policy's "collision" coverage, but rather was covered under a policy's uninsured/undersinsured motorist coverage.⁷

In *Allgood v. Meridian Security Insurance Co.*,⁸ the insured's vehicle was damaged in an automobile accident.⁹ Her insurance company paid for the costs to repair the vehicle, but did not pay for any diminished value.¹⁰ The insured filed a class action lawsuit against her insurer contending that diminished value of the vehicle was a recoverable element of loss under the "collision"¹¹ coverage in the policy. Although the court of appeals concluded that diminished value was covered under the policy, the Indiana Supreme Court disagreed.¹²

The court concluded that the determination of this issue rested on an interpretation of the policy.¹³ The court concluded that under the "collision" coverage within the policy, the insurer "promised to repair the vehicle or to replace it with [a vehicle] of like kind and quality."¹⁴ The insurer did not contractually agree "to restore the value of the vehicle" to its condition before the accident.¹⁵ In arriving at such a conclusion, the court defined the insurer's agreement to "repair" to simply "restore [the vehicle] to its former condition, not necessarily to its former value."¹⁶ Thus, the insurer was not obligated to pay under the "collision" coverage for diminished value of a repaired vehicle.

The same day it issued the *Allgood* decision, the Indiana Supreme Court

5. An example of the policy language includes: "A. Our Limit of Liability for loss will be the lesser of the: 1. Actual cash value of the stolen or damaged property; or 2. Amount necessary to repair or replace the property with property of like kind and quality." *Allgood*, 807 N.E.2d at 132.

6. *Dunn*, 810 N.E.2d at 741; *Allgood*, 807 N.E.2d at 136.

7. *Dunn v. Meridian Mut. Ins. Co.*, 836 N.E.2d 249 (Ind. 2005); *Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d 243 (Ind. 2005).

8. *Allgood*, 836 N.E.2d 243.

9. *Id.* at 245.

10. *Id.*

11. The specific policy language stated that the insurer would "pay for direct and accidental loss to 'your covered auto' or any 'non-owned auto,' including their equipment, minus any applicable deductible shown in the Declarations." *Id.* at 246. The insured argued that "direct and accidental loss" included diminished value of the vehicle. *Id.*

12. *Id.* at 247.

13. *Id.* at 246.

14. *Id.* at 247.

15. *Id.*

16. *Id.*

decided *Dunn v. Meridian Mutual Insurance Co.*¹⁷ In a similar fact scenario, the court concluded that the diminished value of a vehicle was covered under uninsured/underinsured motorist coverage of an insurance policy.¹⁸ After an auto accident with an uninsured motorist, the insured's vehicle was repaired.¹⁹ The insured sought coverage under the uninsured motorist coverage under the policy, whereas the insurer paid for the repairs under the "collision" coverage.²⁰

The Indiana Court of Appeals had concluded that the insured was entitled to the diminished value of the vehicle because the insurer's promise to "repair and replace the [vehicle]" included any diminished value of the vehicle.²¹ However, the Indiana Supreme Court had rejected that conclusion when it reviewed the lower court decision in *Allgood*.²²

In *Dunn*, the insured argued that his claim was compensable under the uninsured motorist protection rather than the "collision" coverage, which was the policy language reviewed by the supreme court in *Allgood*.²³ According to the insured, the uninsured motorist coverage lacked the limiting language which led the court to construe the policy as it did in *Allgood*.²⁴ Under the uninsured motorist coverage, the insurer promised to pay the insured all amounts for which the uninsured motorist may be liable to the insured.²⁵

Although the court stated that it was not proper for the parties to suggest that one form of coverage applied instead of another, the court agreed with the insured.²⁶ The court observed that an insurer is responsible to its insured for all damages that the insured is legally entitled to recover from the uninsured motorist.²⁷ Under Indiana law, a tortfeasor is responsible for diminished value of a vehicle.²⁸ Consequently, an insurer is responsible for diminished value to an insured's vehicle that is damaged by the actions of an uninsured motorist.²⁹

The distinction between the *Allgood* and *Dunn* cases focuses upon an interpretation of the policy language. In each case, the supreme court analyzed the policy language under the respective coverage at issue to see if diminished

17. 836 N.E.2d 249 (Ind. 2005). Although the court noted that this case was decided under Tennessee law, the court observed that Tennessee law and Indiana law appeared the same. *Id.* at 252, 254.

18. *Id.* at 250.

19. *Id.* at 250-51.

20. *See id.* at 251-52.

21. *Id.* at 253.

22. *Id.*; *Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d 243, 247 (Ind. 2005).

23. *Dunn*, 836 N.E.2d at 252.

24. Specifically, the "Limit of Liability" language that restricts an insurer's obligation to the lesser of the costs of repair of the vehicle or actual cash value was not present in the uninsured motorist coverage. *Id.* at 253.

25. *Id.*

26. *Id.* at 253-54.

27. *Id.* at 254.

28. *Id.* at 253 (citing *Wiese-GMC, Inc. v. Wells*, 626 N.E.2d 595, 598 (Ind. Ct. App. 1993)).

29. *Id.* at 253-54.

value was recoverable. Insurance companies will most likely add an exclusion to the policy to eliminate this added damage element or raise rates to reflect the increased risk.

B. An Auto Insurer Was Not Collaterally Estopped to Argue Lack of Coverage for Permissive Use in Accident by Vehicle Operator

The case of *Kelly v. Hamilton*³⁰ presented a very common factual situation when rented vehicles are involved in accidents. While an insured's vehicle was taken to a shop for service, the insured rented another vehicle for temporary use.³¹ The rental agreement between the insured and the rental agency contained a provision which expressly prohibited the rental vehicle's operation by anyone under twenty-one years of age. The insured allowed a nineteen-year-old friend to drive the car who was then involved in an accident resulting in personal injuries to another motorist.³²

The injured motorist filed a lawsuit against the driver.³³ The injured motorist's attorney notified the vehicle's insurer of the lawsuit against the driver. However, the insurer denied owing coverage, including a duty to defend the driver, by contending that its policy only covered "non-owned" vehicles, such as the rental car, if "used by [the insured] or a resident relative with the owner's permission."³⁴ Because the rental agency, as owner of the rental vehicle prohibited drivers under twenty-one years old, the insurer contended that the nineteen-year-old driver lacked permission to drive the rented vehicle.³⁵

Based upon the stipulation, the injured motorist received a judgment against the driver.³⁶ In proceedings supplemental, the injured motorist sought to acquire the insurance proceeds under the vehicle's liability policy and added the insurer as a garnishee-defendant.³⁷ When the insurer appeared and raised the defense that no coverage was available under its policy with the insured, the injured motorist argued that the insurer was collaterally estopped from raising the coverage defense because it had not appeared to defend its insured in the underlying action.³⁸

The appellate court concluded that the insurer was not estopped from asserting the lack of permissive use defense.³⁹ The court observed that when a liability insurer is faced with a lawsuit against its insured and has a question on whether coverage exists for the lawsuit, the insurer may proceed as follows:

30. 816 N.E.2d 1188 (Ind. Ct. App. 2004).

31. *Id.* at 1189.

32. *Id.* at 1190.

33. *Id.*

34. *Id.* at 1194.

35. *Id.* at 1190.

36. *Id.*

37. *Id.*

38. *Id.* at 1191.

39. *Id.*

An insurer may avoid the effects of collateral estoppel by: (1) defending the insured under a reservation of rights in the underlying tort action, or (2) filing a declaratory judgment action for a judicial determination of its obligations under the policy. Either of these actions will preserve an insurer's right to later challenge a determination made in the prior action.

An insurer may also elect not to defend an insured party in a lawsuit if, after investigation of the complaint, the insurer concludes that the claim is "patently outside the risks covered by the policy." Such a course is taken at the insurer's peril because the insurer will be "bound *at least* to the matters *necessarily determined* in the lawsuit."⁴⁰

In *Kelly*, the issue of the driver's permissive use was not necessarily decided in the tort lawsuit where judgment was entered against the driver.⁴¹ Consequently, the insurer was free to raise the lack of permission as a coverage defense.⁴²

As to the permissive use issue, the court concluded that the insurer was correct that no coverage was owed to the driver.⁴³ The rental agency, as owner of the vehicle, expressly prohibited anyone under twenty-one years of age to drive.⁴⁴ The insured's granting of permission to the nineteen-year-old driver was outside the scope of permission that he possessed under the rental agreement.⁴⁵ Consequently, the insurer did not owe liability coverage to the driver.⁴⁶

C. A Plaintiff's Claim for Emotional Distress Damages Arising from Injury to Spouse Is Subject to "Per Person" Limit of Liability Coverage

In *Allstate Insurance Co. v. Tozer*,⁴⁷ the insured was driving a car with a friend and two of the friend's siblings.⁴⁸ After the driver lost control of the car, it struck a telephone pole, killing the friend and causing the siblings minor personal injuries.⁴⁹ The estate of the friend settled a liability claim against the

40. *Id.* (quoting *State Farm Fire & Cas. Co. v. T.B. ex rel. Bruce*, 762 N.E.2d 1227, 1230-31 (Ind. 2002)). An excellent case describing the peril risked by the insured is *Liberty Mutual Insurance Co. v. Metzler*, 586 N.E.2d 897 (Ind. Ct. App. 1992) (finding that the insurer was collaterally estopped to argue intentional conduct of insured who drove truck into restaurant when insurer refused to defend under reservation of rights or file declaratory judgment, and default judgment based on negligence was entered against insured).

41. *Kelly*, 816 N.E.2d at 1191.

42. *Id.*

43. *Id.* at 1197.

44. *Id.* at 1195.

45. *Id.* at 1197.

46. *Id.*

47. 392 F.3d 950 (7th Cir. 2004).

48. *Id.* at 951.

49. *Id.*

driver which included payment by the insured's underlying carrier of \$100,000 which was the limits of coverage available for injury to a single person.⁵⁰ The underlying policy provided coverage of \$100,000 for claims by "each person" and \$300,000 for all claims arising from "each accident."⁵¹

The siblings filed a separate lawsuit against the insured seeking damages for emotional distress after observing the death of their brother.⁵² The lawsuit did not seek to recover damages for the minor physical injuries of the siblings.⁵³ The insurer supplied counsel to defend the insured in the siblings' lawsuit and filed a separate declaratory judgment lawsuit contending that it had exhausted the extent of its coverage exposure by paying the "each person" limits of coverage.⁵⁴ The insurer argued that the siblings' emotional distress claims were subject to the "each person" limit of coverage that was exhausted by payment of the estate's claim, and that no further coverage was owed.⁵⁵

The district court rejected the insurer's argument and found that because the emotional distress claims satisfied the definition of bodily injury claims,⁵⁶ the siblings' claims were subject to separate limits for "each person."⁵⁷ On appeal, the Seventh Circuit reversed.⁵⁸

The Seventh Circuit concluded that the siblings' emotional distress claims were subject to the "each person" limit which was paid to satisfy the claim of the brother's estate.⁵⁹ The court observed that the siblings' emotional distress claims were alleged to have arisen "as a result of" the death of the brother, not because of their own personal injuries.⁶⁰ The policy language explicitly stated that "each person" limits included "all damages sustained by anyone else as a result of" bodily injury to one person.⁶¹

50. The total settlement was for \$1.1 million. One hundred thousand dollars came from the "each person" limits of the underlying policy; the remaining \$1 million came from an umbrella policy. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 952.

55. *Id.*

56. The policy stated:

The limits shown on the Policy Declarations are the maximum we will pay for any single accident involving an insured auto. *The limit stated for each person for bodily injury is our total limit of liability for all damages because of bodily injury sustained by one person, including all damages sustained by anyone else as a result of that bodily injury.* Subject to the limit for each person, the limit stated for each accident is our total limit of liability for all damages for bodily injury.

Id. at 953 (emphasis added).

57. *Id.* at 952.

58. *Id.* at 956.

59. *Id.* at 953.

60. *Id.*

61. *Id.*

This decision appears consistent with earlier Indiana appellate decisions which concluded that a consortium claim by a spouse for injuries sustained by the other spouse, are subject to the “per person” limits of a liability policy.⁶² The policy language appeared to clearly address this situation, and the Seventh Circuit applied that language as written.

D. Under a Conditional Sales Contract, Court Concludes that Buyer Is Owner for Purposes of Insurance Coverage Despite Remaining Conditions to the Sale

The facts in *Great West Casualty Co. v. National Casualty Co.*⁶³ depict a common occurrence following the sale of a vehicle. A seller of a semi-tractor entered into a conditional sales contract with the buyer that included a number of favorable terms for the seller.⁶⁴ Before the contract was completed, the buyer’s driver was involved in an accident that produced personal injuries to another motorist while hauling a load not owned by the seller.⁶⁵ A dispute arose between the seller’s and buyer’s insurance companies as to which of their policies was primary to address the injured motorist’s claim arising from the accident.⁶⁶

The seller’s insurer filed a declaratory judgment action contending that the buyer was the “owner” of the semi-tractor such that the buyer’s insurance was primarily responsible to address the claims arising from the accident.⁶⁷ The buyer’s insurer argued that the seller remained the “owner” and that the driver was considered a “permissive user” of the semi-tractor to be entitled to coverage under the seller’s policy.⁶⁸

In resolving this question, the Seventh Circuit relied upon an Indiana statute⁶⁹ that vested ownership of a vehicle purchased under a conditional sales agreement to the buyer.⁷⁰ The court rejected attempts by the buyer to suggest that the court

62. *Id.* at 955; *see, e.g.,* *Medley v. Frey*, 660 N.E.2d 1079, 1080-81 (Ind. Ct. App. 1996); *cf.* *Armstrong v. Federated Mut. Ins. Co.*, 785 N.E.2d 284 (Ind. Ct. App. 2003) (finding that loss of love and companionship of child killed in accident was not a separate “bodily injury” under the policy when neither parent suffered a physical impact in the accident).

63. 385 F.3d 1094 (7th Cir. 2004).

64. For instance, the buyer agreed to permit the seller to determine which of the buyer’s drivers could operate the semi-tractor until completion of the sales contract. *Id.* at 1095.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1095-96.

69. IND. CODE § 9-13-2-121 (2005) provides:

If a motor vehicle is the subject of an agreement for the conditional sale or lease . . . with the right of purchase upon the performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee . . . the conditional vendee or lessee . . . is considered to be the owner.

70. *Id.* at 1096.

must look at the degree of control maintained by the seller to suggest that the seller was the owner of the semi-tractor.⁷¹

The Seventh Circuit's conclusion created a rare "bright-line" test for ownership and provides excellent guidance to buyers and sellers. Even though terms of the conditional sales agreement placed some degree of control with the seller, for the purpose of assessing the risk for insurance, the buyer was considered the owner.

E. Motor Carrier Policy Endorsement Provides Liability Coverage to Trucker Involved in Accident Despite Other Policy Limitations

A semi-tractor involved in a motor vehicle accident will usually involve tragic consequences. Thus, the federal government requires that semi-tractor operators and owners engaged in interstate commerce provide protection to the public by insuring that the operator has the financial responsibility to protect the public for damages caused by the operator's negligence.⁷² Thus, operators are required to have an MCS-90 insurance endorsement in their liability policies to provide the necessary protections to the public.⁷³ This endorsement provides that the insurer will pay, within the limits of coverage, for losses sustained by the public, and that "[N]o condition . . . in the policy . . . shall relieve the [insurer] from liability or from the payment of any final judgment, within the limits of liability . . . , irrespective of financial condition, insolvency or bankruptcy of the insured."⁷⁴

In *Carolina Casualty Insurance Co. v. E.C. Trucking*,⁷⁵ a truck operator was involved in an accident that resulted in the death of another driver. The truck driver was operating a truck that was owned by one company, but leased to another.⁷⁶ The lessor of the truck also had an operating agreement with the owner company to allow the truck to be driven under the lessor company's Interstate Common Carrier ("ICC") authority.⁷⁷ The lessor did not have its own ICC authority. The decedent's widow brought a wrongful death suit against the driver and the various entities that either owned or leased the tractor.⁷⁸

An insurer for one of the companies who had an operating agreement with the lessor, intervened in the lawsuit to contend that its insurance coverage was

71. *Id.* at 1097-98.

72. *Travelers Ins. Co. v. Transport Ins. Co.*, 787 F.2d 1133, 1140 (7th Cir. 1986) ("The purpose of the [Interstate Common Carrier ("ICC")] regulations is to ensure that an ICC carrier has independent financial responsibility to pay for losses sustained by the general public arising out of its trucking operations.").

73. *See* 49 C.F.R. §§ 387.7(a), 387.9, 387.15 (2005).

74. *Carolina Cas. Ins. Co. v. E.C. Trucking*, 396 F.3d 837, 841 (7th Cir. 2005).

75. *Id.* at 837.

76. *Id.* at 840.

77. *Id.*

78. *Id.*

inapplicable.⁷⁹ However, both the district court and Seventh Circuit concluded that the MCS-90 endorsement, contained in the insurer's policy, voided any restrictions on coverage that may exist within the policy.⁸⁰ Because the broad intent of the MCS-90 endorsement was to compensate the public, it superseded any limitation on coverage contained in the policy.⁸¹

This case is helpful in analyzing the interaction between the broad intent behind the MCS-90 endorsement and limitations in the insurance policy that afford coverage to trucking companies. If a policy contains that endorsement, it appears that its coverage defenses are not applicable, at least to the detriment of the public.

F. In Uninsured Motorist Coverage Case, Absent Claim of Bad Faith, Insured Cannot Recover More Than Policy Limits

In *Allstate Insurance Co. v. Hennings*,⁸² a school teacher was involved in an automobile accident with an uninsured motorist and sustained personal injury. The teacher filed a lawsuit and obtained a default judgment against the uninsured motorist.⁸³ The teacher then amended her complaint to add her uninsured motorist insurer, Allstate, as a defendant.⁸⁴

Allstate defended against the complaint challenging both the liability of the uninsured motorist and the damages of the teacher.⁸⁵ At trial, the uninsured motorist was found fully responsible, and the teacher was awarded \$115,000 in damages against Allstate, even though her uninsured motorist limits were \$100,000.⁸⁶ Allstate filed a motion to correct error seeking, in part, that the trial court reduce the verdict to its policy limits of \$100,000. The trial court denied Allstate's motion, and an appeal ensued.⁸⁷

The Indiana Court of Appeals reversed the trial court, and determined that the verdict should have been reduced to the policy limits.⁸⁸ While the court criticized Allstate's behavior in handling the teacher's claim, it determined that the insurer's behavior did not equate with bad faith.⁸⁹ The court also observed that the teacher did not present a claim for bad faith against the insurer.⁹⁰ The court held that because the claim was solely for uninsured motorist coverage the

79. *Id.* The actual coverage issue was not specifically identified within the court's opinion.

80. *Id.* at 840-41.

81. *Id.* at 841.

82. 827 N.E.2d 1244 (Ind. Ct. App. 2005).

83. *Id.* at 1247.

84. *Id.*

85. *Id.*

86. *Id.* at 1249.

87. *Id.*

88. *Id.* at 1250.

89. *Id.* at 1251.

90. *Id.*

policy limits of the coverage prevented an award beyond the policy limits.⁹¹ Therefore, the trial court abused its discretion when it allowed the jury verdict in excess of the policy limits to stand.⁹²

G. Worker's Compensation Insurer Was Not Entitled to Lien on Employee's Recovery of Uninsured Motorist Benefits from Employee's Personal Policy

In *Pinkerton's Inc. v. Ferguson*,⁹³ an employee in the scope of her employment sustained serious personal injuries from an accident with an uninsured motorist.⁹⁴ As a result of the accident, the employee received more than \$300,000 in workers' compensation benefits from her employer.⁹⁵ When the employee settled for the full limits of \$50,000 in uninsured motorist coverage from a personal insurance policy issued to her husband, the employer asserted a lien on the settlement because of the workers' compensation payments.⁹⁶ The employee filed a declaratory judgment action contending that the employer was not entitled to a lien against the settlement pursuant to the uninsured motorist coverage.⁹⁷

In addressing this question, the court focused upon an Indiana statute that allowed an employer or workers' compensation insurer to assert a lien against proceeds the employee may receive due to liability of "some other person."⁹⁸ Relying upon the decision of *Ansert Mechanical Contractors, Inc. v. Ansert*,⁹⁹ the employer argued that the statute gave it a lien on the employee's uninsured motorist proceeds.¹⁰⁰

However, the appellate court distinguished *Pinkerton's* from *Ansert* by noting that the uninsured motorist coverage was not paid for by the employer.¹⁰¹ Because the uninsured motorist proceeds at issue were not purchased by the employer,¹⁰² the employer was not entitled to a lien.¹⁰³ To allow the employer to obtain a lien on the proceeds would thwart the public policy of workers' compensation, which shifts the risk of employee injury to the employer, and

91. *Id.*; see also *Allstate Ins. Co. v. Hammond*, 759 N.E.2d 1162, 1167 (Ind. Ct. App. 2001).

92. *Hennings*, 827 N.E.2d at 1250-51. The court also abused its discretion in failing to instruct the jury that it could only award a verdict up to the limits of the policy. *Id.* at 1252.

93. 824 N.E.2d 789 (Ind. Ct. App.), *reh'g denied*, *trans. denied*, 841 N.E.2d 185 (Ind. 2005).

94. *Id.* at 790.

95. *Id.*

96. *Id.* at 790-91.

97. *Id.* at 791.

98. See *id.*; see also IND. CODE § 22-3-2-13 (2005).

99. 690 N.E.2d 305 (Ind. Ct. App. 1997).

100. *Pinkerton*, 824 N.E.2d at 792.

101. See *id.*

102. *Pinkerton's* attempted to challenge the employee's ownership of the policy because it was issued to her husband, but because *Pinkerton's* had not responded to the employee's ownership arguments in post-trial briefing, the issue was waived on appeal. See *id.* at 793 n.2.

103. *Id.* at 793.

would instead shift that risk back to the employee who paid for the uninsured motorist coverage.¹⁰⁴

II. COMMERCIAL CASES

A. *Good Faith Dispute on Coverage Issue Does Not Automatically Prevent Claim for Bad Faith Against Insurer*

The decision of *Monroe Guaranty Insurance Co. v. Magwerks Corp.*¹⁰⁵ presented an interesting analysis of the standards to support a claim for bad faith¹⁰⁶ against an insurer who questions the existence of a covered claim. The insured sustained a loss to its building when sections of its roof fell to the floor following a period of heavy rain and snow.¹⁰⁷ The insured submitted a claim to its insurer, who conducted an investigation.¹⁰⁸ During the course of the investigation, the insurer's adjusters made references that the roof damage was from a "collapse" of the roof.¹⁰⁹ However, despite the fact that a building's "collapse" was covered,¹¹⁰ the insurer denied the claim by raising various exclusions.¹¹¹

The insured filed a lawsuit against the insurer for breach of contract and bad faith.¹¹² Both the insured and insurer filed summary judgment motions as to whether the loss resulted from a collapse.¹¹³ The insured argued that the modern view of "collapse" involved a change in the structural integrity, and that coverage existed.¹¹⁴ The insurer argued the "traditional view" of "collapse," required that the building be "reduced to flattened form or rubble."¹¹⁵ Indiana had no decisions adopting either viewpoint.¹¹⁶

The trial court granted the insured's motion for summary judgment, determining that coverage existed for the loss, and the case proceeded to trial on the amount of damages and whether the insurer engaged in bad faith.¹¹⁷ The jury

104. *Id.* at 792-93.

105. 829 N.E.2d 968 (Ind. 2005).

106. It also called a breach of the duty of good faith.

107. *Monroe Guar. Ins.*, 829 N.E.2d at 971.

108. *Id.*

109. *Id.* Specifically, one of the adjusters issued a report describing the loss as "[r]oof damage and collapsed interior ceiling panels." *Id.*

110. The policy provided that the insurer would "pay for loss or damage caused by or resulting from risks or direct physical loss *involving collapse of a building or any part of a building* caused only by one or more of the following: . . . Weight of rain that collects on a roof." *Id.*

111. *See id.*

112. *Id.*

113. *Id.*

114. *See id.* at 972-73 & n.2.

115. *Id.* at 972 & n.1.

116. *See id.*

117. *Id.* at 971.

awarded the insured over \$1 million in compensatory damages under the policy and \$4 million in punitive damages for breach of the insurer's duty of good faith to the insured.¹¹⁸

The Indiana Court of Appeals reversed the verdict, concluding that the modern definition of "collapse" applied to the case, but that there was a genuine issue of material fact as to whether collapse occurred.¹¹⁹ The Indiana Supreme Court affirmed the appellate court's adoption of the modern definition of "collapse" as a "substantial impairment of the structural integrity" of a building.¹²⁰ The supreme court summarily affirmed the court of appeals's reversal of the trial court's grant of summary judgment of the insured.¹²¹

Despite finding that summary judgment was not warranted on the issue of collapse, the supreme court affirmed the jury's finding that the insurer breached its duty of good faith.¹²² The supreme court reaffirmed that a good faith dispute by an insurer of a question of coverage will not support a claim of bad faith.¹²³ Thus, if the sole dispute between the parties was whether coverage existed because of the definition of collapse, then the insured could not recover on a bad faith claim.¹²⁴ However, the court observed that the insured's contention that the insurer engaged in bad faith was not based on the insurer's position on coverage, but was based upon the manner in which the insurer handled the claim.¹²⁵ The supreme court noted that evidence existed to support the insured's claim that the insurer knew a collapse existed, but "manufactured" an excuse to avoid paying the claim.¹²⁶ Thus, despite the fact that a good faith dispute existed as to coverage, the jury's finding of bad faith was supported by other evidence of the manner in which the insurer handled the claim.¹²⁷

B. When Insured Failed to Give Timely Notice of Lawsuit, Insurer Was Not Responsible for Defense Costs Incurred by Insured Before Date of Notice

The case of *Liberty Mutual Insurance Co. v. OSI Industries, Inc.*¹²⁸ involved a complex set of facts, but contains good analysis by the appellate court, reiterating a few basic principles of insurance law. The insured developed an oven used in the fast food industry.¹²⁹ Another company claimed that the oven utilized its trade secret for a component that was stolen by a former employee

118. *Id.*

119. *Id.* at 972.

120. *See id.* at 973.

121. *Id.* at 975.

122. *Id.* at 977.

123. *Id.* at 975 (citing *Freidline v. Shelby Ins. Co.*, 774 N.E.2d 37, 40 (Ind. 2002)).

124. *Id.*

125. *Id.*

126. *Id.* at 976-77.

127. *See id.* at 977.

128. 831 N.E.2d 192 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 190 (Ind. 2005).

129. *Id.* at 196.

subsequently hired by the insured.¹³⁰ As a result, the company brought a lawsuit against the insured alleging a number of legal theories.¹³¹

The insured requested that its insurer provide a defense for the lawsuit, and filed a declaratory judgment action when the insurer denied the request.¹³² The insurer subsequently denied coverage.¹³³ On cross motions, the trial court granted summary judgment for the insured's claim for coverage under the policy, and also determined that the insurer was responsible for a portion of the insured's defense costs.¹³⁴ The insurer appealed, in part, on grounds that the trial court held the insurer responsible for defense costs incurred before notice of the suit was given to the insurer.¹³⁵

On appeal, the court reversed the trial court's award to the insured of defense costs incurred before notice was given to the insurer.¹³⁶ Because the policy required notice of suit "as soon as practicable" and the insured did not provide notice until at least fourteen months after the suit was commenced, the insurer argued that any costs incurred before such notice were outside the policy's coverage.¹³⁷ The appellate court rejected the insured's argument that the insurer was collaterally estopped from asserting its defenses because of its wrongful coverage denial.¹³⁸ Instead, in addressing the notice issue, the court reiterated a two part test: (1) whether notice was provided within a reasonable time; and (2) whether the insurer sustained prejudice from the late notice.¹³⁹ If the notice was unreasonably delayed then prejudice is presumed, and it must be rebutted by the insured.¹⁴⁰ The insurer can also present evidence of actual prejudice.¹⁴¹

The appellate court determined that the insured failed to rebut the presumption of prejudice.¹⁴² The court found that the insurer was prejudiced because it "(1) was denied the opportunity to offer settlement or guide the course of the litigation; (2) was not given the opportunity to select [defense counsel];

130. *Id.*

131. *See id.* The counts included "I) Illinois Consumer Fraud and Deceptive Business Practices Act . . . ; II) Illinois Trade Secret Act . . . ; III) Unfair Competition; IV) Breach of Confidence; V) Interference with Contractual Relations; VI) Breach of Fiduciary Duty; VII) Breach of Contract; and VIII) Conspiracy." *Id.*

132. *Id.* at 196-97. A second insurance company was involved in earlier stages of litigation but was dismissed on all claims and not a party to the appeal. *Id.* at 197 n.5.

133. *Id.* at 197.

134. *Id.*

135. *See id.* at 197, 199.

136. *Id.* at 204.

137. *Id.* at 200-01.

138. *Id.* at 201-02.

139. *Id.* at 202 (citing *Milwaukee Guardian Ins., Inc. v. Reichart*, 479 N.E.2d 1340 (Ind. Ct. App. 1985)).

140. *Id.*

141. *Id.* at 203.

142. *Id.* at 203-04.

and (3) was unable to negotiate the amount of attorney's fees."¹⁴³ Consequently, the insurer was not responsible for defense costs incurred by the insured before receiving notice of the lawsuit.¹⁴⁴

The court also rejected the trial court's creation of an exception to the "American Rule" on the recovery of attorney fees in an insurance coverage lawsuit.¹⁴⁵ The trial court awarded the insured its attorney fees plus interest in pursuing the declaratory judgment.¹⁴⁶ The appellate court observed that the Indiana Supreme Court had adopted the American Rule, and it stated that it was bound to follow precedent.¹⁴⁷ Thus, an insured cannot recover its attorney fees in a declaratory judgment action involving a resolution on the issue of insurance coverage.

*C. Claim for Breach of Duty of Good Faith Does Not Fit Within
Language of Arbitration Clause*

In *Hemocleanse, Inc. v. Philadelphia Indemnity Insurance Co.*,¹⁴⁸ the court affirmed the trial court's grant of a motion to compel arbitration of a breach of contract claim against the insurer and also affirmed the trial court's denial of the insurer's motion to compel arbitration of a claim for breach of the duty of good faith.¹⁴⁹ The insured contended that the insurer breached the insurance policy in failing to reimburse the insured for certain defense costs and committed bad faith by its refusal.¹⁵⁰ The insurer argued that both claims were subject to arbitration under the policy.¹⁵¹

The policy contained a provision that stated "[a]ny coverage dispute which cannot be resolved through negotiations between any insured and the insurer shall be submitted to binding arbitration."¹⁵² The appellate court found that the parties were involved in a "coverage dispute" regarding the costs of the defense and that under the plain language of the policy such dispute was to be arbitrated.¹⁵³

However, the most interesting aspect of this case focused on the insurer's request that the claim for breach of duty of good faith (the bad faith claim) must also be submitted to arbitration. The insurer argued that the facts of the bad faith

143. *Id.* at 204.

144. *Id.*

145. The American Rule provides that a party's attorney fees cannot be recovered as damages in a lawsuit unless a statute, contract, or stipulation permits their recovery. *Id.* at 205; *see also* Kikkert v. Krumm, 474 N.E.2d 503, 504-05 (Ind. 1985).

146. *Liberty Mutual*, 831 N.E.2d at 205.

147. *Id.*

148. 831 N.E.2d 259 (Ind. Ct. App. 2005), *reh'g denied* (Ind. Ct. App. 2006).

149. *Id.* at 260-61.

150. *Id.* at 261.

151. *Id.*

152. *Id.*

153. *Id.* at 262-63.

claim and the coverage claim were so intertwined that they must be decided together.¹⁵⁴ The appellate court rejected the insurer's argument and concluded that, although the bad faith claim "requir[ed] that a 'coverage dispute' under the Policy be resolved," the bad faith claim was not itself a "coverage dispute" requiring arbitration under the policy.¹⁵⁵

III. HOMEOWNERS CASES

A. *Visiting Grandchild Was Not a "Resident Relative" of Insured to Apply Exclusion Under Homeowners Policy*

The decision in *Illinois Farmers Mutual Insurance Co. v. Imel*¹⁵⁶ presented an interesting application of an insurance policy exclusion for claims involving injuries to relatives. The named insured grandparents had an agreement with the mother of their grandchild, that the grandchild would visit their farm two times per month.¹⁵⁷ On one visit, the grandchild was injured when a cow unexpectedly trampled him.¹⁵⁸

The grandparents were insured under a homeowners liability policy that contained the following exclusion: "Coverage L does not apply to: a. bodily injury to you, and if residents of your household, your relatives and persons in your care or in the care of your resident relatives."¹⁵⁹

The insurer contended that no liability coverage was available to the grandparents for the bodily injury claim of the grandchild because the grandchild was in the care of the grandparents.¹⁶⁰ The insurer argued that the construction of the exclusion did not require the grandchild to be a "resident" under all of the scenarios, but only that the grandchild be in the care and custody of an insured.¹⁶¹

The appellate court rejected the insurer's interpretation.¹⁶² The court found that the absence of a comma in the policy exclusion demonstrated that the grandchild needed to be a resident of the grandparents' home in order for the exclusionary effect to take place.¹⁶³

The court then examined whether the grandchild had dual residency with his mother and the grandparents such that coverage was excluded.¹⁶⁴ Although the court acknowledged that insureds could have dual residency in some insurance

154. *Id.* at 264.

155. *Id.* at 264-65.

156. 817 N.E.2d 299 (Ind. Ct. App. 2004).

157. *Id.* at 300.

158. *Id.*

159. *Id.* at 301 (internal quotation marks omitted).

160. *Id.*

161. *Id.*

162. *Id.* at 303-04.

163. *Id.*

164. *Id.* at 304.

disputes,¹⁶⁵ the evidence demonstrated that the grandchild was not a resident of the grandparents' home.¹⁶⁶

This case demonstrates how important punctuation of a policy provision can be when the policy is interpreted. Here, the absence of one comma, resulted in two equally plausible constructions of an insurance policy.¹⁶⁷

B. In Dispute with Agent, Insured's Cause of Action Accrued When Insurer Allegedly Breached Policy

In *Strauser v. Westfield Insurance Co.*,¹⁶⁸ a motorist sustained personal injuries after colliding with an insured's escaped horses that had wandered into the roadway. The motorist brought a lawsuit against the insured seeking insurance coverage from the insured's homeowners insurance carrier.¹⁶⁹ Initially, the insurer supplied counsel to defend the insured under a reservation of rights while it continued to investigate whether coverage existed for the lawsuit. The insurer ultimately concluded that no coverage existed, denied the claim, and withdrew the defense counsel.¹⁷⁰

The motorist's lawsuit against the insured continued, and three years later the insured's attorney executed an agreement assigning the insured's rights to pursue a cause of action against his insurance agent for failing to acquire appropriate insurance coverage to the motorist.¹⁷¹ Five years later, a monetary judgment was entered in favor of the motorist and against the insured.¹⁷² A year and a half later, the motorist, as assignee of the insured, sued the agent for breach of contract and negligence in failing to secure proper insurance coverage.¹⁷³

The insurance agent filed a motion for summary judgment and contended that the motorist's claim was barred by the applicable two-year tort statute of limitations for injury to property.¹⁷⁴ The motorist countered that the appropriate statute of limitations was a ten-year limitation for actions based on a written contract.¹⁷⁵ The court granted the agent's summary judgment motion.¹⁷⁶

On appeal, the court concluded that more than ten years had passed since the

165. *Id.* at 305; see *Jones v. W. Reserve Group*, 699 N.E.2d 711, 716 (Ind. Ct. App. 1998) (holding that whether a child was considered a resident of a household for purposes of uninsured motorist coverage was a question of fact for factfinder).

166. See *Imel*, 817 N.E.2d at 305. The court considered the age of the child, where the child attended school, and even whether the child brought toys to his grandparents' home. *Id.*

167. See *id.* at 303-04.

168. 827 N.E.2d 1181 (Ind. Ct. App. 2005).

169. *Id.* at 1182.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 1182-83.

174. *Id.* at 1183-84; see IND. CODE § 34-11-2-4 (2005).

175. *Strauser*, 827 N.E.2d at 1183-84; see IND. CODE § 34-11-2-11.

176. *Strauser*, 827 N.E.2d at 1183.

cause of action accrued, so the motorist's claim was barred by either the two- or the ten-year statute.¹⁷⁷ The court observed that Indiana applies the "discovery rule" to determine when a cause of action accrues, such that the statute "begins to run when a party knows, or in the exercise of ordinary diligence could discover, that the contract has been breached or that an injury had been sustained as a result of the tortious act of another."¹⁷⁸ In *Strauser*, the action against the agent accrued when the insurer denied the claim.¹⁷⁹ Because the lawsuit was not filed until after ten years from the coverage denial, the case was time-barred under either statute.¹⁸⁰

The court also observed that it is the nature of the lawsuit that determines the applicable limitation period rather than the manner in which a plaintiff labels the complaint.¹⁸¹ Although the court did not clarify whether the action against the agent was for breach of contract or negligence, the court referred to an earlier case to suggest that such an action is probably a negligence claim, rather breach of contract.¹⁸²

IV. STATUTORY CHANGES

During the survey period, one significant statute was enacted that relieves insurance companies from the requirement that they must offer uninsured and underinsured motorist coverages within commercial automobile policies.¹⁸³ Formerly, whenever an insurer issued an auto liability policy, it also had to offer uninsured and underinsured motorist coverages to the insured and obtain a written waiver of those coverages to avoid those coverages from being included as a matter of law.¹⁸⁴ With this new statute, the insurer does not need to offer this coverage or obtain the rejection by the insured of a commercial vehicle.¹⁸⁵

Practitioners may want to inform their clients who operate commercial vehicles of this change. Many employees assume that because they operate a company vehicle, that there will be uninsured and underinsured motorist coverages available. With this statute, most employers who have commercial fleets will probably not carry the coverages, and the employee must make sure that his or her personal coverage will apply to the operation of a company vehicle.

177. *Id.* at 1185.

178. *Id.*

179. *Id.*

180. *Id.* at 1186.

181. *Id.* at 1185.

182. *Id.* (citing *Butler v. Williams*, 527 N.E.2d 231 (Ind. Ct. App. 1988)).

183. See IND. CODE § 27-7-5-1.5 (2005).

184. *Id.* § 27-7-5-2.

185. *Id.* § 27-7-5-1.5.

RECENT DEVELOPMENTS IN INTELLECTUAL PROPERTY LAW

CHRISTOPHER A. BROWN*

The period October 1, 2004 through September 30, 2005, saw several cases of interest to intellectual property owners and practitioners. The Indiana appellate courts issued several decisions in trade secret cases, and the Court of Appeals for the Federal Circuit issued its *en banc* patent claim construction decision. These and other cases are reviewed below.

I. TRADE SECRET CASES

A. Northern Electric Co. v. Torma

In *Northern Electric Co. v. Torma*,¹ the trade secret issues centered around a compilation of data made by an employee, Torma, from information he found while working at Northern Electric. This case is an important study of the Indiana Court of Appeals' view of the rights an employer has in intellectual property, particularly trade secret information, created by an employee.

According to the facts cited by the court, Northern Electric is a small business in South Bend of approximately thirty employees that in the 1980s extended its services to repairing servo motors.² Torma became employed by Northern Electric in 1990, and in the mid-1990s, he was placed in charge of Northern Electric's servo motor department.³ During Torma's supervision of that department, servo motor repair services grew to account for about one-third of Northern Electric's business.⁴

The court then noted that Torma "assembled" repair data in a notebook "[a]s was his custom in previous positions."⁵ Such data included "readings and settings," apparently of the servo motors being repaired, observations that he made or that he obtained from the observations of other Northern Electric employees, as well as information received from manufacturers, other shops, manuals, service bulletins, and information available on the internet.⁶ He also directed other technicians to make similar records. After a period of time, Torma assembled the data into a word processing file on his home computer and kept

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1. 819 N.E.2d 417 (Ind. Ct. App. 2004), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 748 (Ind. 2005).

2. *Id.* at 420. The opinion explains briefly what a "servo motor" is and how it is different from conventional electric motors.

3. *Id.*

4. *Id.*

5. *Id.* The opinion is not clear as to whether this was Torma's custom only in his prior position(s) at Northern Electric or if it was also his custom in prior employment outside of Northern Electric.

6. *Id.*

a copy on portable media (floppy disk or CD-ROM), which he kept locked in his toolbox at work or at his home. According to the court, Torma used the data in his work, and, although he allowed other employees to copy some of the data, he did not allow other technicians access to the entire data compilation.⁷

In 2002, Northern Electric and Torma apparently disagreed on Torma's salary and responsibilities. Approximately at that time, Northern Electric sought to have Torma sign a non-competition agreement. Torma resigned and refused to return the data compilation he had created. He then began to work for a servo motor repair company that he had founded prior to resigning from Northern Electric.⁸ Northern Electric filed suit for trade secret misappropriation, among other things, but, after the bench trial, the trial court decided in favor of Torma. Northern Electric appealed, alleging that the trial court erred when it found that (1) Torma owned his data compilation, and (2) the compilation was not entitled to trade secret protection.⁹

It is especially interesting to note the standard of review the court applied in this case. To prevail in its appeal of the negative judgment, Northern Electric had to demonstrate that "the evidence in the record, along with all reasonable inferences, is without conflict and leads *unerringly* to a conclusion opposite that reached by the trial court."¹⁰ The court emphasized its duty to "affirm the trial court's decision if the record contains *any supporting evidence or inferences*."¹¹ That language suggests quite a tall order for the appellant, especially in such a fact-sensitive case as a trade secret claim. Whether the court properly adhered to that standard is up for debate, for as discussed below, it reversed the trial court.

The court's first substantive point of analysis concerned the ownership of the compilation Torma made. It considered the question of whether an employee owned a collection of data collected at the employer's premises but assembled on his own time an issue of first impression in Indiana.¹² The court reviewed a variety of authority, including the Restatement (Third) of Unfair Competition, cases from the New York state courts, and a Florida federal court.¹³ On the foundation of the Restatement, the court of appeals established a rule for Indiana that in an employer/employee situation, the employee's "'assigned duties' is the decisive element, regardless of when the employee actually performs them."¹⁴

7. *Id.*

8. *Id.*

9. *Id.* at 421. Other errors alleged included that the trial court erred when it found that the claims for conversion and breach of fiduciary duty were not proven.

10. *Id.* (emphasis added).

11. *Id.* at 421-22 (emphasis added).

12. *Id.* at 422.

13. *Id.* at 422-23 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. e (1995); Pullman Group, LLC v. Prudential Ins. Co. of Am., 733 N.Y.S.2d 1 (App. Div. 2001); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hagerty, 808 F. Supp 1555 (S.D. Fla. 1992), *aff'd*, 2 F.3d 405 (11th Cir. 1993)).

14. *Id.* at 423.

Two points are worth noting at this intermediate juncture. First, having some sharp recollections from law school of the relative scorn some have for the Restatement, it is surprising to this commentator that the court of appeals appeared to begin and end its reasoning there. Only two cases from other jurisdictions were cited by the court, one for its reference to the relied-on Restatement section, and one that was termed “instructive” though “decided on a slightly different scenario.”¹⁵ On topics in intellectual property, or at least having to do with unfair competition, it would appear that Indiana courts have no compunction about adopting the principles and verbiage of the Restatement of Unfair Competition. The second point concerns the subtle refocusing of the analysis. Although initially the question aimed at the principles of agency or scope of duties, as discussed below, it was timing and the type of information at issue that swayed the court.

Claiming that the trial court had not cited “any legal principle or authority for its conclusion,” the court of appeals restated three of the trial court’s findings, that court’s implicit rejection of the position that “data assembly” was part of Torma’s duties, and its own “firm conviction that a mistake was made.”¹⁶ “Overwhelming evidence,” said the court, “establishes that data compilation falls squarely within the scope of a servo motor repair technicians assigned duties.”¹⁷ Reciting particular evidence to support its conclusion, the court came to its own factual conclusions:

[E]very trial witness, including Torma, testified to the importance of collecting servo motor data in the course of performing repairs. Everyone acknowledges that the quality of the maintained data resulted in more efficient and rapid repairs in the future. Moreover, [plaintiff’s officer] testified that during several conversations with Torma, they investigated the possibility of making the data collection readily accessible to all employees in the servo motor repair department by storing it on the company’s server. The record reflects that Torma refused, pleading lack of time and computer illiteracy.¹⁸

The court of appeals found that collecting data was important, that the collection of data improved future repair time, and that Northern Electric considered making Torma’s collection available to all repair personnel.¹⁹ There was no determination of actual job duties or scope of employment. Rather than focusing on the “assigned duties” of the employee as determined by a contract or a course of business, the court of appeals’ reasoning suggests that it took the quite expansive view that an employee’s duties include tasks or efforts that are beneficial to the employer in carrying out the general tasks for which the

15. *Id.*

16. *Id.* Recall the quite high standard for reversal stated by the court of appeals earlier in the opinion.

17. *Id.*

18. *Id.* at 424.

19. *Id.*

employee was hired.²⁰

Further, the effect of the facts presented may have been overstated. Taking for granted that a technician must observe the digital data available in a failed servo motor in order to diagnose its failure and to fix it, one is not surprised to hear that witnesses testified to the importance of obtaining servo motor data. Collecting such data, much as a doctor may collect patient data or a lawyer may collect contract examples, will certainly make a technician more efficient. Additionally, if an employer sees a good idea of an employee, it is only good sense to try to implement that idea or system to other employees. However, these pieces of evidence do not speak to the “assigned duties” of the employee.

Perhaps the most troubling aspect of this part of the case is the short shrift given to the traditional notions that (1) an employee owns his own work, absent an agreement to the contrary, and (2) that an employee is free to take the experience and knowledge he or she has amassed to his or her next position. The court of appeals acknowledged the first point in its adoption of the Restatement position, effectively saying that notion does not apply when the employee is acting within the scope of employment.²¹ Nonetheless, assuming a relative disparity in negotiating strength in favor of an employer as against an employee, equity makes a strong case that the “scope of employment” should be narrowly drawn, rather than including essentially any act that improves the employee’s tasks. It should not be taken for granted that one’s “assigned duties” include making those duties easier. As to the second point, the court failed to discuss whether an employee has the right to take experience and knowledge he has amassed when it considered the question of ownership of the compiled data. In this author’s view, that is a significant and somewhat ominous omission. One could categorize an employee’s experience and knowledge gained in a given field as a compilation of data that makes him or her better at that job. This court of appeals opinion, taken to that extreme, seems to cast significant doubt on the employee’s accepted right to take gained experience as he or she leaves an employer. It may be, at that level, a basis for the ultimate non-compete injunction.²²

20. *See id.* The inclusion in its opinion of the statement concerning Torma’s “pleading [of] lack of time and computer illiteracy” also suggests that the court of appeals was subconsciously including a judgment on his character in its analysis. *Id.*

21. *Id.* at 423.

22. *Compare* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989). The determination of the scope of employment in the context of the “work made for hire” principles of the copyright law includes a variety of factors, including

the hiring party right to control the manner and means by which the product [was] accomplished. . . . the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion, over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee

Equally concerning is the apparent discontinuity between the rules the court announced and the reasoning and bases for its legal conclusions. Having established a rule for data ownership based on the scope of the employee's duties, rather than timing, the court's stated conclusions focused on factors other than what Torma's duties actually were. It noted that Torma gathered data during business hours, that "but for Torma's employment," he would not have had access to the data he gathered, and that he used Northern Electric's "facilities and opportunities" in supervising others and being "instrumental in its success."²³ It appears that time, place, opportunity, and success guided the court of appeals, notwithstanding the touchstone of "assigned duties." From the facts relied on by the court, it came to the conclusion opposite from that of the trial court, that the compilation "arose out of [Torma's] assigned duties" and thus belonged to Northern Electric.²⁴

Having found that Torma's compilation belonged to Northern Electric, only then did the court of appeals approach the trade secret issues in the case. Northern Electric attacked on appeal the trial court's determination that the data could not be a trade secret because it was generally known or readily accessible and because Northern Electric did not take reasonable measures to maintain the data's secrecy.²⁵ After reviewing the statutory definition of "trade secret,"²⁶ the court briefly discussed *Amoco Production Co. v. Laird*²⁷ and its characterization of the fact-specific nature of the determination of whether given information is a protectable trade secret.

Addressing whether the data compilation was "readily ascertainable" under Indiana law, the court of appeals took the view that *Amoco Production* authorized protection for information the acquisition of which would require substantial investment of time, money, or effort, with the apparent corollary that a compilation of information can be protected even though the data included in the compilation is generally known or available.²⁸ After acknowledging the public-domain character of data in Torma's compilation, the court of appeals called the compilation a "unique effort" and noted the time and effort Torma expended on the compilation.²⁹ The court went on to say that the compilation had "independent economic value," and thus because duplication of the compilation would, in its view, require "substantial investment of time, expense, and effort, without which Northern Electric would lose a distinctive competitive advantage," the compilation was not "readily accessible" under the trade secret law.³⁰

benefits; and the tax treatment of the hired party.

Id. at 751-52 (internal citations omitted).

23. *N. Elec. Co.*, 819 N.E.2d at 424-25.

24. *Id.*

25. *Id.* at 425.

26. IND. CODE § 24-2-3-2 (2004).

27. 622 N.E.2d 912 (Ind. 1993).

28. *N. Elec. Co.*, 819 N.E.2d at 425-26.

29. *Id.* at 426.

30. *Id.*

This aspect of the court's analysis appears to meld together distinct elements of the statutory definition of a trade secret and continues the weakening of the concept of "readily ascertainable" begun in *Amoco Production*.³¹ The purpose of requiring a protectable trade secret not to be readily ascertainable is, obviously, to prevent information that is known or available from being taken away from the interested public. The traditional formulation of the elements of a trade secret, as the appellate court noted, separates the "not readily ascertainable" quality of the information from its "independent economic value" arising from that quality.³² Nonetheless, the court used information regarding the asserted economic value of the compilation to Northern Electric's business to prove that the compilation was not readily accessible to others.

Aside from the logical difficulty of associating value with accessibility, the court's treatment potentially creates a new analytic scheme that joins two trade secret elements into one. Further, this opinion is an indication of the very narrow reading of the concept of "readily ascertainable."

Given the court's admission that a substantial part of the data in the compilation came from public sources,³³ and in the understanding that information from a failed servo motor is easily obtained by one with experience and training, this is clearly a case in which most or all of the underlying information is available, and only the actual final product is protectable as a trade secret because of the time involved in creating it.³⁴ In order for information to be "readily ascertainable," according to the appellate court's holding and interpretation of *Amoco Production*, it must be obvious and there for all to see. In other words, there appears to be a very fine (or non-existent) line between "known" and "readily ascertainable" as applied to trade secret information. Any presentation of time, effort, or expense could serve to render otherwise public information "not readily accessible," it seems.

The concept espoused in *Northern Electric*, which gives data compiled over a long time trade secret protection, has an interesting parallel and an equally interesting counterpoint in intellectual property law. The parallel is with trademark law. It is axiomatic that trademark rights begin to accrue when the mark is first used, and, as a general proposition, they get stronger as the mark is used assertively and/or over a great length of time.³⁵ This is true because it would take a relatively great investment of advertising money over a long period time to re-develop the goodwill accompanying the mark. *Northern Electric's* view of *Amoco Production* suggests, likewise, that a data compilation begins to gain trade secret value from the first entry, and becomes more valuable and less readily ascertainable as more entries are made. Consequently, as more time would be required to re-create the information from scratch, even though each individual entry may have taken negligible time, the value of the compilation

31. *Id.* at 425.

32. *Id.*; see IND. CODE § 24-2-3-2 (1) (2005).

33. *N. Elec. Co.*, 819 N.E.2d at 426.

34. *Id.*

35. *Id.*

increases. In counterpoint, the copyright law clearly does not protect a work just because one has invested significant effort in making it.³⁶ There must be some originality, some creative contribution, in order to qualify for copyright protection.³⁷ The requirement in the Indiana Uniform Trade Secret Act (“IUTSA”) that a trade secret not be readily accessible provides what could be an analogous requirement, that the trade secret provide some original information over and above what it is already known. However, that interpretation is not the view taken by the court of appeals in the *Northern Electric* opinion. Although the Supreme Court rejected the “sweat-of-the-brow” doctrine in copyright law in the *Feist* case,³⁸ the prevailing interpretation of Indiana’s trade secret law places significant value on “sweat-of-the-brow” in and of itself.³⁹

The second trade secret issue facing the court concerned whether Northern Electric took reasonable steps to maintain the secrecy of its data. The court relied principally on its previous case of *Zemco Manufacturing, Inc. v. Navistar International Transportation Corp.*⁴⁰ in interpreting this element and reiterated the fact-sensitive nature of the inquiry as well as giving a list of possible actions for maintaining confidentiality of information.⁴¹ In analyzing this element, the court found that Torma’s own actions to protect his data compilation redounded to the benefit of Northern Electric, based on his duties to his employer as well as the determination that Northern Electric owned the data compilation.⁴²

Assuming the viability of the underlying assumptions, i.e. that Northern Electric owns the data and Torma owed Northern Electric a duty to protect the data, the conclusion that Torma’s protection of the data, including keeping it in his locked tool box at work, not allowing others access to the entire compilation, and keeping it locked up at his home, benefited Northern Electric appears warranted. However, the appellate court did not stop with those facts. It further relied on Northern Electric’s size and culture to create an analysis that focuses more on the “reasonable” aspect of this trade secret element and less on the “maintain secrecy” aspect.⁴³ The court rationalized its result from evidence that Northern Electric is a small company with “long-term” employees with a “trusting relationship” with the company.⁴⁴ Such evidence, the court reasoned, indicated that Northern Electric trusted its employees, and it further noted that no “security breaches” occurred during the time that Torma headed the servo motor repair department.⁴⁵ With the steps Torma himself took to restrict access to the compilation, the appellate court held that the trial court erred as a matter

36. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 360 (1991).

37. *Id.*

38. *Id.*

39. *N. Elec. Co.*, 819 N.E.2d at 426.

40. 759 N.E.2d 239 (Ind. Ct. App. 2001).

41. *N. Elec. Co.*, 819 N.E.2d at 426-27.

42. *Id.* at 427.

43. *Id.*

44. *Id.* at 428.

45. *Id.*

of law when it concluded that Northern Electric did not take reasonable protective steps.⁴⁶

The court of appeals' analysis on this point is actually quite remarkable. After looking askance at the steps taken by Northern Electric, the court was persuaded by Northern Electric's argument that employer trust and the lack of leaks was sufficient to meet its burden to prove effort to maintain secrecy imposed by statute. Read broadly, this opinion appears to indicate that a threshold showing of sufficient efforts to maintain secrecy can be made out by a demonstration of few employees, a friendly culture, and corporate trust. Although the court does discuss in some detail the steps Torma took to maintain secrecy, and attributed them at least in part to Northern Electric, it is not clear that those steps were a deciding factor.⁴⁷

Accordingly, it is evident from this case that the affirmative steps to maintain secrecy made by the putative trade secret holder is not the only, or perhaps even the most important, factor in considering whether the information was the subject of reasonable efforts to maintain secrecy.

The final point on intellectual property law in *Northern Electric* concerns the appellate court's finding of misappropriation by Torma. After reciting part of the misappropriation standard from the statute,⁴⁸ the court noted that Northern Electric had asked Torma to leave the compilation, and Torma refused. In the court's view, in light of its conclusion that Northern Electric owned the compilation, "[Torma's] possession of the data became unauthorized and his acquisition improper."⁴⁹ With no further discussion, the court overturned the ruling below that no misappropriation had occurred.

Unfortunately, there is little or no discussion of Torma's intent in the recitation of facts in this opinion, and the appellate court does not discuss at all how it determines that "improper means"⁵⁰ were used to acquire the trade secret. The only parts of the misappropriation standard recited by the appellate court concerned (1) acquisition of a trade secret by one "who knows or has reason to know that the trade secret was acquired by improper means," and (2) use of a trade secret by one who "used improper means to acquire the knowledge of the trade secret."⁵¹ Unless there was some unstated indication in the record that Torma knew or had reason to know he was acting improperly, or that Torma's collection of data constituted "improper means," there is a void in the court's misappropriation analysis. The statute defines "improper means" to include "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means."⁵² Torma's collection of data benefited both his employer and himself, and nothing suggests

46. *Id.*

47. *See id.* at 427-28.

48. IND. CODE § 24-2-3-2 (2004).

49. *N. Elec. Co.*, 819 N.E.2d at 429.

50. *Id.*; *see* IND. CODE § 24-2-3-2.

51. *N. Elec. Co.*, 819 N.E.2d at 429 (citing IND. CODE § 24-2-3-2).

52. IND. CODE § 24-2-3-2.

that anyone thought the act of collecting the data was or could be considered improper. At the time he left Northern Electric, Torma had the knowledge in the data compilation that he had properly acquired. Notwithstanding the open-ended nature of the definition of “improper means,” the term “improper means” does not appear in the appellate record. The seemingly ex post finding of “improper means” in Torma’s refusal to leave a compilation that he apparently thought, with some reason,⁵³ belonged to him is another remarkable feature of this opinion.

Thus, as it applies to intellectual property law, *Northern Electric* is noteworthy in that it adopts the Restatement position concerning ownership of information created by employees. Its conclusions flowing from that rule, and particularly its willingness to overturn the trial court’s findings in view of the high threshold it set for doing so, may be questioned, however. Its trade secret analysis, as noted above, provides a low threshold for a plaintiff to prove a putative trade secret is not readily ascertainable, and it further suggests a very broad interpretation of what are reasonable efforts to maintain secrecy, particularly for small businesses.

B. Paramanandam v. Herrmann⁵⁴

In *Paramanandam v. Herrmann*, the plaintiff alleged that the defendant had misappropriated trade secrets. Herrmann hired Paramanandam and his firm to develop a retail website for Herrmann’s scales marketing business.⁵⁵ Paramanandam, who had some experience in that field with a relative of Herrmann, used his own software to design the website, obtained permission from product manufacturers to display pictures and information on the site, registered domain names, and developed key words to direct customers to the retail website via search engines.⁵⁶ Paramanandam suffered health problems about a year after being hired by Herrmann, and after Herrmann denied his request to be able to work from home for a higher salary, the business relationship was terminated.⁵⁷ Shortly thereafter, Herrmann found that Paramanandam had started his own online scale store, which site was “practically

53. Recall that the question of ownership was considered a question of first impression in Indiana, and that the Restatement rule adopted by the court of appeals is that the employee owns such data unless collection is within his or her assigned duties. In counterpoint, in its discussion of a conversion claim brought under Indiana Code sections 35-43-4-3 and 34-24-3-1, the court cited to testimony which it took to show that Torma knew Northern Electric had a right to the information Torma had collected. It is not clear to this author that the conclusion the appellate court drew from that testimony is warranted; moreover, it is not understood why that testimony and the conclusion drawn therefrom was not cited in connection with the discussion of misappropriation.

54. 827 N.E.2d 1173 (Ind. Ct. App. 2005).

55. *Id.* at 1175. As used herein, “Herrmann” refers to the individual plaintiff and her sole proprietorship business.

56. *Id.*

57. *Id.*

identical” to the design of Herrmann’s site except for company information and logos, that he was using a domain name originally registered while he was working with Herrmann, and that internet searches using Herrmann’s business name or telephone number resulted in a listing of Herrmann’s business but had a link to Paramanandam’s site.⁵⁸

Herrmann filed suit requesting injunctive relief, alleging trade secret violations in Paramanandam’s use of information on Herrmann’s website and domain names developed, created, and maintained for Herrmann’s business.⁵⁹ Following a preliminary injunction hearing, the trial court entered an order “which closely track[ed] the language of [the] complaint” granting an injunction against use of information copied from plaintiff’s website, domain names, or other information received by Paramanandam while employed by plaintiff, and it further required him to remove from his websites all such information.⁶⁰ On appeal, the court considered whether plaintiff had established a prima facie case of trade secret misappropriation.⁶¹ Holding that plaintiff “failed to establish that any efforts were made to maintain [the] secrecy” of the alleged trade secrets, the court reversed the preliminary injunction.⁶²

The appellate court’s conclusion rested on the testimony of John Herrmann that they “chose not to be secretive” and that information on Herrmann’s website was “left out for the general public to see.”⁶³ According to the court, the record demonstrated that there was one bit of information—prices—that did not appear on Herrmann’s website, but there was no allegation of misappropriation of price information. Further, the court found no evidence of effort to keep domain names secret; to the contrary, the record suggested that plaintiff “intended for the domain names to be readily available to potential customers searching the internet.”⁶⁴ The court gave two interesting notes in dicta as well. First, it stated, “by way of illustration only,” that plaintiff did not take the steps of employing a password or paid subscription to its site as a way of restricting availability of information.⁶⁵ Certainly, the court’s statement gives the impression that a password or subscription limitation could be considered steps to maintain secrecy, but, in fact, those steps do not maintain secrecy. Rather, they only serve to limit the disclosure of the ostensible trade secret. It is submitted that disclosure of a trade secret to certain persons or for a fee, without some promise of secrecy, is a system of disclosure and not an attempt to maintain secrecy.

The second piece of dictum suggests a theme for future trade secret

58. *Id.*

59. *Id.* at 1175-76.

60. *Id.* at 1176-78.

61. *Id.* at 1179.

62. *Id.* at 1179-80.

63. *Id.* at 1180. Notably, the court considered *Northern Electric Co. v. Torma*, 819 N.E.2d 417 (Ind. Ct. App. 2005), discussed above, to be inapposite based on this quote, saying that in *Northern Electric*, information was not left out for the public to see. *Id.*

64. *Id.*

65. *Id.* at 1180 n.7.

defendants, particularly those accused by a former employer, as it notes that the plaintiff “seems to seek to prevent competition by its former agent more than it seeks to protect a trade secret.”⁶⁶ That statement suggests that this court sensed an elevation of form over substance in this case, and that it (and perhaps now trial courts as well) will be amenable to arguments that a trade secret claim does not adequately fit the realities of a given case.

C. U.S. Land Services, Inc. v. U.S. Surveyor, Inc.⁶⁷

This decision of the court of appeals resulted from an interlocutory appeal of the grant of a preliminary injunction in a trade secret case. The two issues the court considered were whether the trial court erred in finding that the information at issue constituted trade secrets and whether the issued injunction was overbroad.⁶⁸ The plaintiff below, Surveyor, was in the business of coordinating land surveys by taking requests for quotes from customers, identifying qualified local surveyors and obtaining bids from them, and providing a quote from one surveyor to the customer.⁶⁹ Surveyor had compiled data on customers and prospective customers as well as surveyors.⁷⁰ The individual defendants below, Harding and Wyber, had been employed by Surveyor in management positions and, “at some point,” became involved with the corporate defendant Land Services.⁷¹ Surveyor’s complaint alleged trade secret violations and breach of non-competition agreements and, following a hearing, successfully enjoined all three defendants from “conducting or participating in any manner in the survey management and coordination business through the defendant U.S. Land Services.”⁷²

On appeal, the defendants argued that Surveyor’s customer, prospect, and surveyor lists, which the trial court found the defendants to have taken and used, were not in fact trade secrets. After quoting the statute,⁷³ the appellate court defined four traits of a protectable trade secret: (1) information, (2) which derives independent economic value, (3) “is not generally known, or readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use,” and (4) “the subject of efforts reasonable under the

66. *Id.* at 1180 n.8 (internal quotation marks omitted) (quoting *Harvest Life Ins. Co. v. Getche*, 701 N.E.2d 871 (Ind. Ct. App. 1998)).

67. 826 N.E.2d 49 (Ind. Ct. App. 2005).

68. *Id.* at 52.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 53, 62. The appellate court, notably, reprinted apparently the entire injunctive order issued by the trial court, including thirty-six numbered paragraphs of findings of fact and sixteen numbered paragraphs of conclusions of law, which amounted to over ten pages. Thus, there is a somewhat more comprehensive view of the case that was presented to the trial court than frequently is provided in trade secret cases.

73. IND. CODE § 24-2-3-2 (2005).

circumstances to maintain its secrecy.”⁷⁴ Defendants’ sole argument focused on the third element, maintaining that the lists at issue were readily ascertainable “through trade publications, the yellow pages, and the internet.”⁷⁵ As in the *Northern Electric* case discussed above, the court took from *Amoco Production Co. v. Laird*⁷⁶ the ideas that a combination of public domain information which “in unique combination, affords a competitive advantage” and that the effort of compiling such public domain information is “of itself, entitled to protection.”⁷⁷ The court went on to repeat *Amoco*’s statement that “the mere availability of other proper means will not excuse a trade secret misappropriation.”⁷⁸ After reviewing some of the trial court’s findings, including the finding that some of the information in the lists at issue was not available from public sources, the court of appeals ruled that the conclusion that information taken and used by the defendants constituted trade secrets was not clearly erroneous.⁷⁹

The court of appeals discussed aspects of the injunction itself and found that the order was overbroad in some respects and acceptable in others.⁸⁰ Of note in that discussion is the court’s analysis of whether the defendants could be enjoined from conducting any survey management business. A number of considerations and review of cases in Indiana and from other jurisdictions were provided with the result that the injunction against operating such a business was reversed.⁸¹ The court noted parenthetically that an injunction preventing operation of a business is not a priori impermissible, but that “common” types of trade secret injunctions are “production injunctions” prohibiting manufacture of a product and “use injunctions” to prohibit use of a trade secret.⁸² The discussion of these types of injunctions and their bases and theories will be useful to the practitioner, as will the other analysis provided by the court in reversing part of the injunction.

However, the court of appeals’ following of *Amoco* extends the position of the Indiana Supreme Court that conflates the requirements for a trade secret with the acts of the defendants. That position is logically quite troublesome insofar as it reads out of the statute a requirement for protection. If information is “readily ascertainable by proper means,” then it cannot by definition fall within the boundaries of Indiana Code section 24-2-3-2, regardless of the acts of the defendant. To award trade secret protection for information that can be “readily” developed by “other proper means” grants property rights not anticipated by the

74. *U.S. Land Servs.*, 826 N.E.2d at 63 (citing *Hydraulic Exch. & Repair, Inc. v. KM Specialty Pumps, Inc.*, 690 N.E.2d 782 (Ind. Ct. App. 1998)).

75. *Id.*

76. 622 N.E.2d 912 (Ind. 1993).

77. *U.S. Land Servs.*, 826 N.E.2d at 63-64 (quoting *Amoco*, 622 N.E.2d at 919-20).

78. *Id.* at 64 (quoting *Amoco*, 622 N.E.2d at 920).

79. *Id.*

80. *Id.* at 65-69.

81. *Id.* at 67-69.

82. *Id.* at 69 n.6.

language of the statute and, presumably, not by the legislature.⁸³ In other words, if a defendant takes information that is otherwise readily ascertainable, he or she may be guilty of ethically questionable judgment, or perhaps another business tort, but not trade secret misappropriation. Until it is proved that information is a trade secret, there is nothing to misappropriate under the trade secret act.

Nonetheless, that logical difficulty seems to wash out given the Indiana Supreme Court's policy decision to create what appears to be a very wide scope for the word "readily" in this context. By moving from the general statement that a substantial investment of time, expense, or effort qualifies as evidence that information is not readily ascertainable to the particular implication that the effort of compiling represents such an investment, the *Amoco* opinion initially, and the *U.S. Land Services* opinion now, seem to allow practically any showing to meet a plaintiff's burden to demonstrate that his or her information is not readily ascertainable. Thus, even if the current state of the law does not initially treat the readily ascertainable aspect of the trade secret statute with logical rigor, by choosing to accept effort in re-creating information independently as making the information not readily ascertainable, the courts have made the definition of trade secret more expansive. In effect, the current state of the law seems to be that because effort in gathering information provides protection, obtaining information without effort signals a trade secret violation. Although that may be an acceptable, or at least satisfying outcome, it does not seem to comport well with the letter of Indiana's trade secret statute. In *U.S. Land Services*, as in numerous trade secret cases, the facts seem to indicate questionable or unethical practices, making a finding of liability appealing, even if a more logically rigorous treatment of the trade secret law might yield a different result.

D. Coleman v. Vukovich⁸⁴

In this case, Vukovich had worked for Coleman in a business that Coleman owned. Vukovich left "[w]ith Coleman's blessing" to create a new company that would serve some of Coleman's customers.⁸⁵ Subsequently, Coleman approached Vukovich with a covenant not to compete, and Vukovich's refusal to sign apparently broke a deal for the sale of Coleman's business. Coleman sued Vukovich for (1) tortiously interfering with contractual relations by refusing to sign the covenant not to compete, (2) misappropriating trade secrets, and (3)

83. Indeed, the opinion implicitly hints at this point in discussing the overbreadth of aspects of the trial court's injunction. In the words of the appellate court, "[t]he purpose behind the [trade secret] Act is to protect trade secrets, not to prevent competition altogether." *U.S. Land Servs.*, 826 N.E.2d at 67 (citing *Hydraulic Exch. & Repair, Inc. v. KM Speciality Pumps, Inc.*, 690 N.E.2d 782, 788 (Ind. Ct. App. 1998)). Note also Judge Baker's partial dissent and Judge Friedlander's concurrence, in which issues of proper competition vis á vis the trade secret law and proper injunctions are discussed. If there is no meaningful limitation on whether information is "not readily ascertainable," the reach of the trade secret act could reach legal (if sharp) competition.

84. 825 N.E.2d 397 (Ind. Ct. App. 2005).

85. *Id.* at 400.

converting or trespassing on chattels. The trial court granted summary judgment in favor of Vukovich on the first two claims, but it denied summary judgment on the third.⁸⁶

On the tortious interference claim, the appellate court upheld the judgment, finding that there was no contract between Vukovich and the buyer.⁸⁷ Notably, it also found that Vukovich had no duty to enter into an agreement not to compete.⁸⁸ Citing a prior appeal that found a non-compete agreement between Coleman and Vukovich invalid, and being unpersuaded that Vukovich's action was malicious and directed to injuring Coleman, the court found no basis to extend either a covenant not to compete or the duty to enter one to Vukovich.⁸⁹ As to the third claim, which concerned allegations of conversion and trespass to customer files, a laptop computer, and software, the trial court found that issues of material fact existed as to entitlement to those properties that precluded summary judgment.⁹⁰

The court affirmed the trial court's grant of summary judgment against Coleman on the trade secret claim for misappropriation of detailed customer files and records.⁹¹ The appellate court found that Coleman and his business "failed to show that they took sufficient steps to maintain secrecy of the information at issue."⁹² The customer information at issue was available to all of Coleman's employees because it was kept in unlocked files located in open view, computers were not password-protected, and information was publicly posted without a confidentiality marking. Additionally, employees were not required to sign confidentiality agreements.⁹³ The court, relying on a number of cases, determined as a matter of law that "lax security" and "haphazard approach[es] to confidentiality agreements" would not support trade secret protection.⁹⁴

The analysis in *Coleman* regarding steps to maintain secrecy should be compared to the related analysis in *Northern Electric*, discussed above. Initially, it is noted that the *Coleman* court phrased its conclusion in terms of "sufficient"

86. *Id.*

87. *Id.* at 403-04.

88. *Id.*

89. *Id.*

90. *Id.* at 406-08. A brief discussion of conversion, trespass to chattel, and replevin are provided along with the appellate court's initial thoughts regarding the state of the facts relating to those claims, possible resolutions of them, and damage theories. The court's short commentary is nevertheless quite useful to the practitioner considering claims ancillary or additional to trade secret or other intellectual property causes of action.

91. *Id.* at 404.

92. *Id.* at 405.

93. *Id.*

94. *Id.* at 405-06 (citing *N. Elec. Co. v. Torma*, 819 N.E.2d 417, 427 (Ind. Ct. App. 2004), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 748 (Ind. 2005); *Zemco Mfg., Inc. v. Navistar Int'l Transp. Corp.*, 759 N.E.2d 239, 246 (Ind. Ct. App. 2001); *Flotec, Inc. v. S. Research, Inc.*, 16 F. Supp. 2d 992, 1004-05 (S.D. Ind. 1998)).

steps, rather than “reasonable” steps as the statute reads.⁹⁵ So long as “sufficient” and “reasonable” are equivalent in the analysis, and there is nothing in the *Coleman* opinion to suggest otherwise, that phraseology does not appear to be objectionable. The principal factual differences between *Coleman* and *Northern Electric* in this context seem to be (1) that *Coleman* left information unlocked and in plain view, while *Torma* took pains to keep data in locked boxes and away from other employees and (2) that *Coleman*’s employees could get to the information without difficulty, while *Torma* did not allow other employees access to the whole of the information, only certain parts. There is also no clear indication in the *Coleman* opinion as to the size of *Coleman*’s business, whereas business size played a pivotal role in the *Northern Electric* case.⁹⁶ It is also curious that the *Coleman* court discussed exclusively the behaviors and conditions at *Coleman*’s (the trade secret plaintiff) business, while much of the *Northern Electric* analysis centered on the defendant’s actions and how they inured to the plaintiff’s benefit.

*E. PrimeCare Home Health v. Angels of Mercy Home Health Care, L.L.C.*⁹⁷

This trade secret case pitted health care institutions against each other. A former employee of PrimeCare, Murray, became the administrator of defendant, Angels of Mercy.⁹⁸ PrimeCare sought an injunction against alleged misappropriation of its client list, which purportedly contained “confidential patient information.”⁹⁹ The plaintiff, in its motion for a preliminary injunction, argued that defendants “raided” it for patients and employees and took a “customer list.”¹⁰⁰ Defendants countered by saying that no such list had been obtained. Instead, the caregivers informed patients that the caregivers were leaving and that the patients could choose to stay at PrimeCare or follow them to Angels of Mercy.¹⁰¹ PrimeCare’s request for an injunction was denied because the trial court found that the cited client list was not a trade secret and that PrimeCare had no evidence that defendants had taken the list.¹⁰²

In considering these trade secret issues, the *PrimeCare* court framed the “not readily ascertainable” inquiry somewhat differently than in the cases discussed above.

The threshold factors to be considered are the extent to which the

95. Uniform Trade Secrets Act, IND. CODE §§ 24-2-3-1 to -8 (2005).

96. Of course, the *Coleman* litigation began, and the trial court may have granted the appealed judgment, before the *Northern Electric* opinion was decided. Had the order of things been reversed, perhaps *Coleman* would have sought to present evidence paralleling that which swayed the *Northern Electric* court.

97. 824 N.E.2d 376 (Ind. Ct. App. 2005).

98. *Id.* at 379.

99. *Id.*

100. *Id.* (internal quotation marks omitted).

101. *Id.*

102. *Id.* at 379.

information is known by others and the ease by which the information could be duplicated by legitimate means. Information alleged to be a trade secret that cannot be duplicated or acquired absent a substantial investment of time, expense or effort may meet the 'not readily ascertainable' component of a trade secret¹⁰³

The focus on ease of duplication by legitimate means maintains the proper logical process and does not absorb into the threshold determination of whether information is a trade secret any consideration of the culpability of the accused defendant.

Having given that framework, however, the court then looked at the actions of the defendants and found that notwithstanding that a customer list can sometimes be a trade secret, PrimeCare's statement that a comparison of the defendants' client list and PrimeCare's former client list does not reach a threshold showing that the defendants took such a list.¹⁰⁴ The court differentiated this case from others by noting that defendants did not take a physical list or compilation of data, but merely knew patients' identities through their work at PrimeCare.¹⁰⁵ Thus, "[t]hey had no need to resort to improper means to gain that information," because "[g]enerally known information is outside the statutory protection."¹⁰⁶ Comparing this case to *Steenhoven v. College Life Insurance Co. of America*,¹⁰⁷ the *PrimeCare* court focused on a passage from that opinion noting that where the essence of the complaint is to prevent competition, the trade secret statute is not an appropriate means for redress.

The fact that [defendant] possesses certain knowledge acquired within the course of his employment does not mandate that, upon his departure, [he] must wipe clean the slate of his memory. Rather, it is clear from the language of the act that the Uniform Trade Secrets Act was promulgated by the legislature to prevent the abusive and destructive usurpation of certain economically-imbued business knowledge commonly referred to as trade secrets. We do not believe the legislature ever intended the statute's provisions to act as a blanket post facto restraint on trade. . . . Having forgone [a covenant not to compete], we believe it misguided to attempt to stem such competition by arguing, in essence, that properly-acquired knowledge of the employer's business is automatically made a trade secret pursuant to the Act, without regard to the nature of the

103. *Id.* at 381 (citing *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912, 919 (Ind. 1993); *Franke v. Honeywell, Inc.*, 516 N.E.2d 1090, 1093 (Ind. Ct. App. 1987)).

104. *Id.*

105. *Id.*

106. *Id.* The court further noted that "[a]part from statutory protection," goodwill between a business and its customers can be protected by a covenant not to compete, but none existed in this case. *Id.* at 381-82 (citing *Titus v. Rheitone, Inc.*, 758 N.E.2d 85, 92 (Ind. Ct. App. 2001)); *accord* *Rice v. Hulsey*, 829 N.E.2d 87, 90 (Ind. Ct. App. 2005).

107. 460 N.E.2d 973 (Ind. Ct. App. 1984).

information, simply because it can be compiled into a table or a list.¹⁰⁸

These thoughts and theories are compatible with the analysis in *Northern Electric*, but it is a better approach in the author's view.

II. TRADEMARK AND UNFAIR COMPETITION CASES

A. *Rice v. Hulsey*¹⁰⁹

This case briefly discusses the relationship between goodwill as a business asset and a non-compete agreement in the context of the sale of that business. Hulsey sold Just Drains, a plumbing business, to Rice with assets including "the name Just Drains, and all of the goodwill of the business[,]” but did not include in the transaction a covenant not to compete with Rice.¹¹⁰ After Hulsey set up a new business and began soliciting previous customers, Rice filed suit alleging a breach of contract grounded in Hulsey's solicitation of former customers after selling the goodwill of the business. Hulsey moved for and was granted summary judgment.

"Goodwill" is a term frequently encountered in trademark law as an indicator of the strength or value of a mark. It is axiomatic that a trademark cannot be sold by itself (an "assignment in gross"), but can only be sold in conjunction with the goodwill asset that it represents.¹¹¹ Indiana common law defines "goodwill" as "the probability that old customers of the firm will resort to the old place of business where it is well-established, well-known, and enjoys the fixed and favorable consideration of its customers' or 'the expectation of continued public patronage.'"¹¹² Rice argued that because he purchased the goodwill in Just Drains from Hulsey, Hulsey was prohibited from soliciting Just Drains' customers because Rice bought the expectation of favorable customer consideration and continued patronage. Rice relied on *Fogle v. Shah*,¹¹³ which acknowledged that the sale of goodwill provides the buyer with a "right to expect the firm's established customers will continue to patronize the purchased business."¹¹⁴ This right is defeated when a seller begins competing with the buyer.¹¹⁵

The court of appeals took the position that the goodwill asset does not protect

108. *PrimeCare*, 824 N.E.2d at 382 (quoting *Steenhoven*, 460 N.E.2d at 975 n.7).

109. 829 N.E.2d 87 (Ind. Ct. App. 2005).

110. *Id.* at 89 (internal quotation marks omitted).

111. A trademark assignment in gross results in a loss of rights in the mark.

112. *Rice*, 829 N.E.2d at 90 (quoting *Berger v. Berger*, 648 N.E.2d 378, 383 (Ind. Ct. App. 1995)).

113. 539 N.E.2d 500 (Ind. Ct. App. 1989). The *Rice* court also noted the appellant's reliance on *Dicen v. New SESCO, Inc.*, 806 N.E.2d 833 (Ind. Ct. App.), *vacated*, 822 N.E.2d 975 (Ind. 2004), but did not further consider that case due to its vacation on grant of transfer to the Indiana Supreme Court.

114. *Rice*, 829 N.E.2d at 90 (quoting *Fogle*, 529 N.E.2d at 502).

115. *Id.* (citing *Fogle*, 529 N.E.2d at 502).

itself, or put another way, that what would appear to be an infringement or taking of goodwill (as defined above) is not actionable by itself.¹¹⁶ Rather, the court held that goodwill is protected by a covenant not to compete.¹¹⁷ Absence of such a covenant, as in this case, means that the seller of a business can solicit the customers previously served by the business. The court cited its opinion in *PrimeCare Home Health v. Angels of Mercy Home Health Care, L.L.C.*¹¹⁸ for the proposition that goodwill is a protectable interest “that may be addressed by a reasonable non-competition agreement.”¹¹⁹ The appellate court noted that Rice cited no authority to suggest that the sale of goodwill by itself would support a claim based on the seller’s solicitation of former customers and upheld summary judgment against Rice on the breach of contract claim.¹²⁰

This case clearly illustrates that a covenant not to compete is a necessary adjunct to a sale of business goodwill if the buyer expects the right to uncompromised access to the business’s existing customers at the time of the sale. Although it may be considered either hard competition or a sharp practice, without a covenant not to compete, a seller can leave the closing table, set up a competing business, and seek the same customers he or she served immediately prior to the closing. Practitioners will also bear in mind that covenants not to compete are not favored insofar as they restrict competition and place a limitation on one’s freedom to do business, and a court may void a covenant entirely if it is overly restrictive. Consequently, if a covenant entered ancillary to a business sale is voided, the buyer cannot then fall back on the goodwill asset to support a claim that the seller has infringed on his goodwill asset to keep the seller away from former customers of the business. A proper covenant not to compete is thus an important consideration for a buyer of any business.

B. Keaton & Keaton v. Keaton¹²¹

This unfair competition case arose out of the similar names of two law firms. The plaintiff, Keaton & Keaton, P.C., which the appellate court named “Rushville Keaton,” was established as a partnership in 1971 and was incorporated in 1978.¹²² The defendant (“Ft. Wayne Keatons”) was a partnership formed in 2002 between two brothers, one of which had a solo practice in Ft. Wayne as of 1996.¹²³ Having received a communication from a third party

116. *Id.*

117. *Id.*

118. 824 N.E.2d 376 (Ind. Ct. App. 2005).

119. *Rice*, 829 N.E.2d at 90 (citing *PrimeCare*, 824 N.E.2d at 381-82).

120. *Id.* Parenthetically, the court’s holding in this regard also defeated Rice’s claim for interference with a business relationship. Because Hulsey’s actions were not in violation of his sale of goodwill, and no illegal actions were alleged, the interference claim would not stand. *Id.* at 91.

121. 824 N.E.2d 1261 (Ind. Ct. App. 2005), *vacated and aff’d on other grounds*, 842 N.E.2d 816 (Ind. 2006).

122. *Id.* at 1262.

123. *Id.*

concerning a client of the Ft. Wayne Keatons, Rushville Keaton made a cease and desist request.¹²⁴ After the Ft. Wayne Keatons refused to cease using the Keaton name, Rushville Keaton filed suit.¹²⁵ On summary judgment, the plaintiff designated the following evidence: (1) medical records that were requested by the Ft. Wayne Keatons but were sent to Rushville Keaton, (2) an order from a court in a case in which the Ft. Wayne Keatons were participating, again sent to Rushville Keaton, and (3) an inquiry by a court clerk as to whether one of the Ft. Wayne Keatons was related to Rushville Keaton.¹²⁶ The trial court granted summary judgment in favor of the Ft. Wayne Keatons.¹²⁷

The plaintiff's argument on appeal, relying on *Felsher v. University of Evansville*,¹²⁸ claimed that the defendants' use of a nearly identical name constituted unfair competition.¹²⁹ The *Felsher* case, following earlier appellate opinions, equated "unfair competition" with conduct tending "to deceive the public so as to pass off the goods or business of one person as and for that of another."¹³⁰ Notably, the trial court required, and the appellate court approved, an element of intent by the defendant.¹³¹ The appellate court, focusing on the deception requirement as laid out in *Felsher* and observing that the ordinary meaning of "deception" denotes intentional misleading or causing to believe what is false, held that a cause of action for unfair competition requires proof of "some level of intent to deceive."¹³² The court found that plaintiff's proffered evidence of unfair competition appeared to be "inadvertent mistakes or simple curiosity," and, therefore, it was not reasonable to infer an intent to deceive.¹³³ Further, the court found no evidence of any deceit by the Ft. Wayne Keatons, and thus upheld the trial court's summary judgment in their favor.¹³⁴

The most important point from this case is the enumeration of an intent-to-deceive requirement for a count of unfair competition under the Indiana common law. The only intent element found in the Federal trademark law is that the

124. *Id.*

125. *Id.* The court characterized the cause of action as unfair competition. To practitioners familiar with trademark law, the action is probably more precisely a common law trademark infringement claim. However, the term "unfair competition" will be used throughout the discussion of this case, to maintain consistency with the appellate court's usage, and because a common law trademark infringement claim is traditionally thought of as a type of unfair competition. *See, e.g.,* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 20 (1995).

126. *Keaton*, 824 N.E.2d at 1263.

127. *Id.* at 1262.

128. 755 N.E.2d 589 (Ind. 2001)

129. *Keaton*, 824 N.E.2d at 1263.

130. *Id.* (emphasis added) (quoting *Felsher*, 755 N.E.2d at 598).

131. *Id.*

132. *Id.* at 1264. Unfortunately, the court then decided that it not need to say what level of intent to deceive must be proved, and it left that question open.

133. *Id.* at 1263.

134. *Id.* at 1264.

defendant must intend to act as he does.¹³⁵ So long as the defendant intended to do business under a certain name, and a likelihood of confusion or deception arises, a *prima facie* case under the Lanham Act can be made; there is no requirement for a plaintiff to show that the defendant had some malicious intent. The *Keaton* case adopts a different view for Indiana. Per *Keaton*, consumer confusion as to the manufacturer or seller of goods or services is not sufficient to support an unfair competition claim. The plaintiff must allege and prove that the defendant's actions were aimed at deceiving consumers or others as to the origin of goods or services. Certainly in a few cases there will be the "smoking memo" that demonstrates malicious intent or a course of action by the defendant from which a trier of fact could legitimately infer such intent. However, it would appear that the tort of unfair competition, already limited to "passing off" by the *Felsher* opinion, is further limited to cases in which the defendant demonstrated intent to deceive.

In early 2006, the Indiana Supreme Court weighed in on this case. In *Keaton & Keaton v. Keaton*,¹³⁶ the court affirmed the appellate result, but added some further discussion. The court first found that two varieties of unfair competition were alleged in the case, one of a "passing off" variety and one of trade name infringement. As to the first claim, the court called passing off "nothing more than a subspecies of fraud" and agreed that it requires a showing of intentional deception.¹³⁷ Summary judgment on that claim was properly granted for the reason the appellate court gave, i.e., that no evidence of intentional misrepresentation or deception was provided.¹³⁸

The supreme court took a more expansive view of the second claim than did the appellate court. It clearly stated that the tort of unfair competition is not limited to passing off, and that there are some bases for unfair competition that do not require a showing of "intentional wrongdoing."¹³⁹ The second claim was characterized as trade name infringement, and citing the Restatement, the court held that a trade name infringement claim must include showings of (1) a protectible trade name, and (2) the defendant's use of a name is likely to cause confusion "as to the source of goods or products."¹⁴⁰ Subjective intent to deceive or confuse is not at issue, though it may raise "a rebuttable inference of a likelihood of confusion."¹⁴¹ The court thus rejected the lower courts' basis of lack of intent in denying summary judgment. It nonetheless affirmed the result on the alternative ground that there was insufficient showing of the distinctiveness, uniqueness, or recognition of plaintiff's name in a wide area, and no actionable injury in its local area.¹⁴²

135. 15 U.S.C. § 1125(a)(1) (2000).

136. 842 N.E.2d 816 (Ind. 2006).

137. *Id.* at 819.

138. *Id.*

139. *Id.* at 820.

140. *Id.*

141. *Id.*

142. *Id.* at 821.

Two points may be taken from the supreme court's affirmance in this case. First, the supreme court directly approved of prior court of appeals precedent providing a broad definition of unfair competition, apparently leaving quite an open field for possible unfair competition claims. The broad definition remains amorphous, however, since beyond its comments on trade name infringement, the court did not provide much guidance into what other fact patterns or types of conduct might constitute "unfair competition." A second point is somewhat more troubling to the Indiana trademark and unfair competition law practitioner. Note that although the supreme court's definition of "trade name" in essence identifies a name that identifies and distinguishes a *business*, its definition of "infringement" focuses on confusion with respect to *goods*, a standard appropriate to infringement of a trademark. Trademarks and trade names have traditionally had separate but philosophically-related legal protection, with marks generally enjoying stronger protection than trade names. This is due principally to the interest in protecting the consumer, who sees the mark but not necessarily the corporate name, from confusion, and also in protecting the goodwill built up in the mark from substantial use in the marketplace. The supreme court's language focusing on confusion as to source of goods does not appear to be consistent with the traditional separateness of trade names and trademarks.

III. PATENT CLAIM CONSTRUCTION: *PHILLIPS V. AWH CORP.*¹⁴³

As noted in last year's survey of intellectual property cases, the U.S. Court of Appeals for the Federal Circuit accepted for en banc review a case with potentially wide-ranging effects on construction of patent claims in infringement cases. In *Phillips v. AWH Corp.*,¹⁴⁴ the Federal Circuit provided a relatively comprehensive treatment of claim construction, but it failed to lay out a black-letter roadmap for judges and patent practitioners to follow.

Of particular note, the court rejected a broad reading of the opinion in *Texas Digital Systems, Inc. v. Telegenix, Inc.*¹⁴⁵ which required a primary or exclusive emphasis on defining claim terms from dictionary or other sources external to the patent specification and its prosecution history.¹⁴⁶ In *Texas Digital*, a panel of the court indicated that proper claim construction first found an ordinary meaning from objective sources, such as dictionaries.¹⁴⁷ A patent's specification and prosecution history was then only reviewed to see if a different or particular definition(s) was indicated.¹⁴⁸ Although permitting use of dictionaries, and even noting that in some cases judges will be able to provide the applicable ordinary meaning of a claim term themselves, the *Phillips* decision places such extrinsic

143. For a detailed explanation of this case, see Christopher Cotropia, *Observations on Recent Patent Decisions: The Year in Review*, 88 J. PAT. & TRADEMARK OFF. SOC'Y 46, 47-51 (2006).

144. 415 F.3d 1303 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 1332 (2006).

145. 308 F.3d 1193 (Fed. Cir. 2002).

146. *Id.* at 1204.

147. *Id.*

148. *Id.*

claim construction evidence clearly behind the specification and file history of the patent.¹⁴⁹

Phillips reaffirms the claim construction processes and maxims provided in *Markman v. Westview Instruments, Inc.*,¹⁵⁰ *Vitronics, Inc. v. Conceptronic, Inc.*,¹⁵¹ and *Innova/Pure Water, Inc. v. Safari Water Filtration Systems, Inc.*¹⁵² The goal of claim construction is to find the ordinary meaning of claim terms as they are understood by one of ordinary skill in the relevant technological art.¹⁵³ To do so, the court¹⁵⁴ must look first at the specification and prosecution history of the patent.¹⁵⁵ The specification will indicate at least the context in which a particular claim term was used, and it will provide explicit or implicit definitions or limitations on the scope of terms in some cases.¹⁵⁶ The prosecution history, likewise, will indicate how the patent applicant used particular terms.¹⁵⁷ Additionally, arguments made to the Patent and Trademark Office to overcome prior rejections may reveal a particular definition or sense for a claim term.¹⁵⁸ The court also indicated that “extrinsic” evidence, such as dictionary meanings or expert testimony, may be used, but they will generally be of less value than the specification and file history.¹⁵⁹

For good or ill, at the end of the day, the process of claim construction is going to be left, for the foreseeable future, to federal trial court judges and their good judgment. *Phillips* provides good guidance insofar as it emphasizes the “ordinary meaning to the person of ordinary skill” standard, and instructs courts to focus in the first instance on a patent’s specification and claims. It also makes a definitive pronouncement on *Texas Digital* and its spotlight on dictionary or other definitions. On the other hand, the court missed an opportunity to make substantial changes to the method and evidence of claim construction to provide more certainty to patent litigation. In some cases, a dictionary or the judge’s own pronouncement may be sufficient for construing a claim. In others, a lengthy *Markman* hearing with multiple experts and other extrinsic evidence will be necessary along with the intrinsic specification and prosecution history evidence. In this author’s view, *Phillips* does not advance the art of claim construction, but it at least provides a very general framework.

149. *Phillips*, 415 F.3d at 1322-24.

150. 52 F.3d 967, 979-81 (Fed. Cir. 1995) (en banc), *aff’d*, 517 U.S. 370 (1996).

151. 90 F.3d 1576, 1582-83 (Fed. Cir. 1996).

152. 381 F.3d 1111, 1116-17 (Fed. Cir. 2004).

153. *Phillips*, 415 F.3d at 1313.

154. The *Phillips* court reaffirmed that the construction of claims is a question of law.

155. *Phillips*, 415 F.3d at 1317.

156. *Id.* at 1321.

157. *Id.* at 1317.

158. *Id.*

159. *Id.* at 1318.

SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

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INTRODUCTION

In the eleven years since the Indiana General Assembly amended the Indiana Product Liability Act (“IPLA”)¹ in 1995, Indiana judges and product liability practitioners have made significant strides in refining and defining its scope and meaning. The 2005 survey period² brought continued activity by the Indiana Court of Appeals with respect to a variety of product liability issues. The Seventh Circuit Court of Appeals and the United States District Court for the Southern District of Indiana issued a surprising number of substantively important product liability federal decisions.

This survey does not attempt to address in detail all of the cases decided during the survey period that might be interesting to Indiana product liability practitioners.³ Rather, it examines selected cases that address important product

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1. This survey article follows the lead of the Indiana General Assembly and employs the term “product liability” (not “products liability”) when referring to actions governed by the IPLA.

2. The survey period is October 1, 2004, to September 30, 2005.

3. There were many cases decided during the survey period that simply cannot be treated in detail here because of space constraints even though they may be interesting to Indiana product liability practitioners. Two such cases involve issues of federal preemption. In *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005), the United States Supreme Court held that the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) does not expressly preempt state law-based claims for defective design, defective manufacture, negligent testing, and breach of express warranty. *Id.* at 443. FIFRA does not expressly preempt state law-based failure-to-warn and fraud claims if they are found to be equivalent or parallel to FIFRA’s labeling requirements covering “misbranding.” *Id.* at 447. In another interesting preemption case, *McMullen v. Medtronic, Inc.*, 421 F.3d 482 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1464 (2006), the Seventh Circuit affirmed a Southern District of Indiana decision that the federal requirements imposed by the Food and Drug Administration pursuant to the Medical Device Amendments to the Federal Food, Drug and Cosmetic Act preempted plaintiff’s common law claims against a device manufacturer for post-sale failure to warn. *Id.* at 490.

liability issues. This survey also provides some background information, context, and commentary where appropriate.

I. THE SCOPE OF THE IPLA

The Indiana General Assembly first enacted the IPLA in 1978. It originally governed claims in tort utilizing both negligence and strict liability theories. In 1983, the General Assembly amended it to apply only to strict liability actions.⁴ In 1995, the General Assembly amended the IPLA to once again encompass theories of recovery based upon both strict liability and negligence.⁵

In 1998, the General Assembly repealed the entire IPLA and recodified it, effective July 1, 1998.⁶ The 1998 recodification did not make substantive revisions; it merely redesignated the statutory numbering system to make the IPLA consistent with the General Assembly's reconfiguration of the statutes governing civil practice.

The IPLA, Indiana Code sections 34-20-1-1 to -9-1, governs and controls all actions that are brought by users or consumers against manufacturers or sellers for physical harm caused by a product, "regardless of the substantive legal theory or theories upon which the action is brought."⁷ When Indiana Code sections 34-20-1-1 and -2-1 are read together, there are five unmistakable threshold requirements for IPLA liability: (1) a claimant whom is a user or consumer and is also "in the class of persons that the seller should reasonably foresee as being subject to the harm caused";⁸ (2) a defendant that is a manufacturer or a "seller . . . engaged in the business of selling [a] product";⁹ (3) "physical harm caused

In addition, because product liability cases often turn on the admissibility, credibility, and persuasiveness of opinion witnesses, *Henderson v. Freightliner, LLC*, No. 1:02-cv-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832, at *1 (S.D. Ind. Mar. 24, 2005) and *Norfolk S. Ry. Co. v. Estate of Wagers*, 833 N.E.2d 93 (Ind. Ct. App. 2005), *trans. denied* (Ind. 2006), are also cases in which product liability practitioners will be interested. In *Henderson*, a case involving an injured diesel truck mechanic, the court held that opinion witness testimony about components of the truck, the truck itself, and the circumstances of plaintiffs' injuries was relevant, and that the offered testimony was admissible despite lack of peer review and specific scientific validation. *See* 2005 U.S. Dist. LEXIS 5832, at *30-53. In *Estate of Wagers*, a case involving alleged exposure to asbestos and diesel fumes, the court affirmed the trial court's denial of a motion to exclude plaintiffs' opinion witness. 833 N.E.2d at 38.

4. Act of Apr. 21, 1983, 1983 Ind. Acts 297.

5. Act of Apr. 26, 1995, 1995 Ind. Acts 278; *see Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 487 n.2 (Ind. 2001).

6. The current version of the IPLA is found in Indiana Code sections 34-20-1-1 to -9-1.

7. IND. CODE § 34-20-1-1 (2005).

8. Indiana Code section 34-20-1-1 identifies a proper IPLA claimant as a "user" or "consumer." Indiana Code section 34-20-2-1(1) requires that IPLA claimants be in the "class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition."

9. Indiana Code section 34-20-1-1(a) identifies proper IPLA defendants as "manufacturers"

by a product”;¹⁰ (4) a product that is in a defective condition unreasonably dangerous to a user or consumer or to his property;¹¹ and (5) a product that reached the user or consumer without substantial alteration in its condition.¹² Indiana Code section 34-20-1-1 makes clear that the IPLA governs and controls all claims that satisfy these five requirements, “regardless of the substantive legal theory or theories upon which the action is brought.”¹³

A. “. . . brought by a user or consumer . . .”

The language the General Assembly employs in the IPLA is very important when it comes to who qualifies as IPLA claimants. Indiana Code section 34-20-1-1 provides that the IPLA governs claims asserted by “users” and “consumers.” For purposes of the IPLA, “consumer” means:

- (1) a purchaser;
- (2) any individual who uses or consumes the product;
- (3) any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question; or
- (4) any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably

or “sellers.” Indiana Code section 34-20-2-1(2) provides the additional requirement that such a manufacturer or seller also be “engaged in the business of selling the product,” effectively excluding corner lemonade stand operators and garage sale sponsors from IPLA liability.

10. IND. CODE § 34-20-1-1(3) (requiring “physical harm caused by a product”).

11. *Id.* § 34-20-2-1 (2005) (requiring that the product at issue be “in a defective condition unreasonably dangerous to any user or consumer or . . . to his property”).

12. *Id.* § 34-20-2-1(3) (requiring that the product at issue “is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable”). Indiana Pattern Jury Instruction 7.03 sets out a plaintiff’s burden of proof in a product liability action. It requires a plaintiff to prove each of the following propositions by a preponderance of the evidence:

- (1) the defendant was a manufacturer of the product (or part of the product) alleged to be defective and was in the business of selling the product;
- (2) the defendant sold, leased, or otherwise put the product into the stream of commerce;
- (3) the plaintiff was a user or consumer of the product;
- (4) the product was in a defective condition unreasonably dangerous to users or consumers (or to user’s or consumer’s property);
- (5) the plaintiff is in a class of persons the defendant should reasonably have foreseen as being subject to the harm caused by the defective condition;
- (6) the product was expected to and did reach the plaintiff without substantial alteration of the condition in which the defendant sold the product;
- (7) the plaintiff or the plaintiff’s property was physically harmed; and
- (8) the product was a proximate cause of the physical harm to the plaintiff or the plaintiff’s property.

13. *Id.* § 34-20-1-1.

expected use.”¹⁴

“User” has the same meaning as “consumer.”¹⁵ Several published decisions in recent years construe the statutory definitions of “user” and “consumer.”¹⁶

A literal reading of the IPLA demonstrates that even if a claimant qualifies as a statutorily-defined “user” or “consumer,” he or she also must satisfy another statutorily-defined threshold before proceeding with a claim under the IPLA. That additional threshold is found in Indiana Code section 34-20-2-1(1), which requires that the “user” or “consumer” also be “in the class of persons that the seller should reasonably foresee as being subject to harm caused by the defective condition.”¹⁷ Thus, the plain language of the statute assumes that a person or entity must already qualify as a “user” or a “consumer” *before* a separate “reasonable foreseeability” analysis is undertaken.¹⁸ In that regard, the IPLA

14. *Id.* § 34-6-2-29.

15. *Id.* § 34-6-2-147.

16. See *Butler v. City of Peru*, 733 N.E.2d 912 (Ind. 2000) (mentioning that a maintenance worker could be considered a “user or consumer” of an electrical transmission system because his employer was the ultimate user and he was an employee of the “consuming entity”); *Estate of Shebel v. Yaskawa Elec. Am., Inc.*, 713 N.E.2d 275 (Ind. 1999) (holding that a “user or consumer” includes a distributor who uses the product extensively for demonstration purposes). For a more detailed analysis of *Butler*, see Joseph R. Alberts & David M. Henn, *Survey of Recent Developments in Indiana Product Liability Law*, 34 IND. L. REV. 857, 870-72 (2001). For a more detailed analysis of *Estate of Shebel*, see Joseph R. Alberts, *Survey of Recent Developments in Indiana Product Liability Law*, 33 IND. L. REV. 1331, 1333-36 (2000).

17. Indiana Code section 34-20-2-1 imposes liability when “a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user’s or consumer’s property . . . if . . . that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition.”

18. It is important to recognize the distinction between the “reasonable foreseeability” test employed pursuant to Indiana Code section 34-20-2-1(1) and the separate “reasonableness” components of Indiana Code sections 34-20-4-1, -3, and -4. Indiana Code section 34-20-4-1 provides that a “product is in a defective condition . . . if, at the time it is conveyed by the seller to another party, it is in a condition . . . not contemplated by reasonable persons among those considered expected users or consumers of the product.” Indiana Code section 34-20-4-3 provides that “[a] product is not defective under [the IPLA] if it is safe for reasonably expectable handling and consumption. If an injury results from handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under [the IPLA].” Indiana Code section 34-20-4-4 incorporates the same premise: “[a] product is not defective under [the IPLA] if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.”

Indiana Code section 34-20-4-1 employs a “reasonableness” test to measure the condition of the product relative to its risks among persons already *considered expected users or consumers*. Similarly, Indiana Code sections 34-20-4-3 and -4 employ a “reasonableness” test to determine whether the product is handled and consumed in expectable ways. These analyses should be

does not appear to provide a remedy to a claimant whom a seller might reasonably foresee as being subject to the harm caused by a product's defective condition if that claimant falls outside of the IPLA's definition of "user" or "consumer."

On February 7, 2006, the Indiana Supreme Court decided *Vaughn v. Daniels Co. (West Virginia)*,¹⁹ further defining and narrowing who qualifies as a "user" or "consumer" for purposes of bringing an action under the IPLA. Although the court decided *Vaughn* outside the 2005 survey period and presumably will be addressed in more detail in next year's survey article, practitioners should be aware of the decision. Briefly, the facts are as follows: Daniels Company designed and built a coal preparation plant at a facility owned by Solar Sources, Inc.²⁰ Part of the design involved the installation of a heavy media coal sump.²¹ An out-of-state steel company manufactured the sump that Daniels designed and sent it, unassembled, to the facility.²²

Stephen Vaughn worked for the construction company that Daniels hired to install the sump.²³ During the installation process, Vaughn climbed onto the top of the sump to help connect a pipe. The chain he was using to secure the pipe in place gave way, causing Vaughn to fall and sustain injuries.²⁴ Vaughn did not wear his safety belt when he climbed onto the sump.²⁵

Vaughn and his wife sued Daniels, alleging, among other things, "negligent design, manufacturing, and maintenance of the sump and the processing plant," as well as a "strict liability" claim. The trial court granted summary judgment to Daniels, concluding that Daniels owed no duty of care to Vaughn and that Vaughn was not a "user" or "consumer" under the IPLA. The court of appeals affirmed summary judgment for Daniels on the negligence claim, but reversed on the product liability claim based upon an expansive view of the terms "user" and "consumer."²⁶

The Indiana Supreme Court held that Daniels could not be liable under the IPLA because Vaughn was not a "user" or "consumer." The court also concluded that Daniels could be liable, however, under a separate common law theory of recovery. With regard to the IPLA claim, Vaughn could not be considered either a purchaser of the sump or a person "acting for or on behalf of

separate and distinct from an examination that employs "reasonableness" as a guidepost for a user's or consumer's foreseeability as a potential IPLA plaintiff.

19. 841 N.E.2d 1133 (Ind. 2006).

20. *Id.* at 1136.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. 777 N.E.2d 1110 (Ind. Ct. App. 2002), *clarified on reh'g*, 782 N.E.2d 1062 (Ind. Ct. App. 2003), *vacated*, 841 N.E.2d 1133 (Ind.), *reh'g denied* (Ind. 2006). For a more detailed analysis of the court of appeals's decision in *Vaughn*, see Joseph R. Alberts & Jason K. Bria, *Survey of Recent Developments in Indiana Product Liability Law*, 37 IND. L. REV. 1247, 1250-57 (2004).

the injured party.”²⁷ Although the *Vaughn* court recognized that “use” of a product might include “installation or assembly” if the manufacturer intends the product “to be delivered to the ultimate purchaser in an unassembled state[,]” such was not the case here because Solar ordered an “assembled and installed product.”²⁸ Because the “product” was not assembled and installed at the time of Vaughn’s accident, “neither Vaughn nor anyone else was a user of the product at the time it was still in the process of assembly and installation.”²⁹

Vaughn did not have a product liability claim for negligent design of the sump because he was not a “user” or “consumer.” Practitioners should recognize, however, that the *Vaughn* court addresses his theoretical product liability claim against Daniels as if it were a strict liability claim.³⁰ The court’s opinion, as a result, has the potential to confuse those who seek to interpret it consistent with the IPLA’s requirements. Vaughn’s alleged design defect claim, if it existed, would not have been a “strict liability” claim because the IPLA requires him to prove, among other things, that Daniels “failed to exercise reasonable care under the circumstances in designing the product.”³¹

Practitioners also should consider in its proper context the common law negligence claim the Indiana Supreme Court allowed to proceed against Daniels. Vaughn argued, among other things, that Daniels was “negligent” in its design and manufacture of a “defective coal sump constituting a latent danger in the use of the product.” The *Vaughn* court’s holding makes it clear that such allegations are not product liability claims.³² Rather, the claims that survive against Daniels allege common law negligence for failing to “design” (i.e., provide) sufficient safety devices to protect workers during installation of the sump within the context of the larger plant.

B. “. . . against a manufacturer or seller. . .”

For purposes of the IPLA, “[m]anufacturer” . . . means a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer.”³³ “Seller” . . . means a person engaged in the business of selling or leasing a product for resale, use, or consumption.”³⁴ Indiana Code section 34-20-2-1(2) employs nearly identical language when addressing the threshold requirement that liability under the IPLA will not attach unless the “seller is

27. *Vaughn*, 841 N.E.2d at 1139.

28. *Id.*

29. *Id.*

30. *Id.* at 1138-43.

31. IND. CODE § 34-20-2-2 (2005); *see, e.g.*, *Burt v. Makita USA, Inc.*, 212 F. Supp.2d 893, 899-900.

32. *Vaughn*, 841 N.E.2d at 1144.

33. IND. CODE § 34-6-2-77 (2005).

34. *Id.* § 34-6-2-136.

engaged in the business of selling the product.”³⁵

Sellers can be held liable as manufacturers in two ways. First, if the seller fits within Indiana Code section 34-6-2-77(a)’s definition of “manufacturer,” which expressly includes a seller who:

(1) has actual knowledge of a defect in a product; (2) creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process; (3) alters or modifies the product in any significant manner after the product comes into the seller’s possession and before it is sold to the ultimate user or consumer; (4) is owned in whole or significant part by the manufacturer; or (5) owns in whole or significant part the manufacturer.³⁶

Second, a seller can be deemed a statutory “manufacturer” and, therefore, be held liable to the same extent as a manufacturer, in one other limited circumstance. Indiana Code section 34-20-2-4 provides that a seller may be deemed a “manufacturer” if the court “is unable to hold jurisdiction over a particular manufacturer” and if the seller is the “manufacturer’s principal distributor or seller.”³⁷

There is one other important provision about which practitioners must be aware when it comes to liability of “sellers” under the IPLA. When the theory of liability is based on “strict liability in tort,”³⁸ Indiana Code section 34-20-2-3

35. *Id.* § 34-20-2-1(2); *see, e.g.*, *Williams v. REP Corp.*, 302 F.3d 660 (7th Cir. 2002) (recognizing that Indiana Code § 33-1-1.5-2(3), the predecessor to Indiana Code § 34-20-2-1, imposes a threshold requirement that an entity must have sold, leased, or otherwise placed a defective and unreasonably dangerous product into the stream of commerce before IPLA liability can attach and before that entity can be considered a “manufacturer” or “seller”); *Del Signore v. Asphalt Drum Mixers*, 182 F. Supp. 2d 730 (N.D. Ind. 2002) (holding that although the defendant provided some technical guidance or advice relative to ponds at an asphalt plant, such activity was not sufficient to constitute substantial participation in the integration of the plant with the pond so as to deem it a “manufacturer” of the plant); *see also* Joseph R. Alberts & James M. Boyers, *Survey of Recent Developments in Indiana Product Liability Law*, 36 IND. L. REV. 1165, 1170-72 (2003).

36. IND. CODE § 34-6-2-77(a) (2005).

37. *Id.* § 34-20-2-4. *Kennedy v. Guess, Inc.*, 806 N.E.2d 776 (Ind.), *reh’g denied* (Ind. 2004), is the most recent case interpreting Indiana Code section 34-20-2-4 and specifically addressing the circumstances under which entities may be considered “manufacturers” or “sellers” under the IPLA. *See also* *Goines v. Federal Express Corp.*, No. 99-cv-4307-JPG, 2002 U.S. Dist. LEXIS 5070, at *14-15 (S.D. Ill. Jan. 8, 2002). The court, applying Indiana law, examined the “unable to hold jurisdiction over” requirement of Indiana Code section 34-20-2-4. *Id.* at *9. The plaintiff assumed that “jurisdiction” refers to the power of the court to hear a particular case. The defendant argued that the phrase equates to “personal jurisdiction.” The court refused to resolve the issue, deciding instead to simply deny the motion for summary judgment because the designated evidence did not clearly establish entitlement to application of Indiana Code section 34-20-2-4. *Id.* at *14-15.

38. The phrase “strict liability in tort,” to the extent that the phrase is intended to mean

provides that an entity that is merely a “seller” and cannot be deemed a “manufacturer” is not liable, and is not a proper IPLA defendant.³⁹

C. “. . . for physical harm caused by a product. . .”

For purposes of the IPLA, “physical harm” means “bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property.”⁴⁰ It does not include “gradually evolving damage to property or economic losses from such damage.”⁴¹

For purposes of the IPLA, “product” means “any item or good that is

“liability without regard to reasonable care,” appears to encompass only claims that attempt to prove that a product is defective and unreasonably dangerous by utilizing a manufacturing defect theory. Indiana Code section 34-20-2-2 provides that cases utilizing a design defect or a failure to warn theory are judged by a negligence standard, not a “strict liability” standard.

39. IND. CODE § 34-20-2-3- (2005). In *Ritchie v. Glidden Co.*, 242 F.3d 713 (7th Cir. 2001), the court cited what is now Indiana Code section 34-20-2-3 for the proposition that sellers in a product liability action may not be liable unless the seller can be deemed a manufacturer. *Id.* at 725-26. Applying that reading of what is now Indiana Code section 34-20-2-3, the court held that defendant Glidden could not be liable pursuant to the IPLA because the plaintiff failed to designate sufficient facts to demonstrate that Glidden had actual knowledge of an alleged product defect (lack of warning labels) and because Glidden did not meet any of the other statutory definitions or circumstances under which it could be deemed a manufacturer. *Id.* There is an omission in the *Ritchie* court’s citation to what is now Indiana Code section 34-20-2-3 that may be quite significant. The statutory provision quoted in *Ritchie* leaves out the following important highlighted language: “A product liability action [*based on the doctrine of strict liability in tort*] may not be commenced or maintained.” *Id.* at 725 (emphasis added). The *Ritchie* case involved a failure to warn claim against Glidden under the IPLA. Indiana Code section 34-20-2-2 makes it clear that “liability without regard to the exercise of reasonable care” (strict liability) applies now only to product liability claims alleging a manufacturing defect theory. Claims alleging design or warning defect theories are controlled by a negligence standard. *See, e.g., Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893 (N.D. Ind. 2002); *see also* Alberts & Boyers, *supra* note 35, at 1173-75.

40. IND. CODE § 34-6-2-105(a) (2005).

41. *Id.* § 34-6-2-105(b); *see, e.g., Fleetwood Enters., Inc. v. Progressive N. Ins. Co.*, 749 N.E.2d 492, 493 (Ind. 2001) (holding that “personal injury and property damage to other property from a defective product are actionable under the IPLA, but their presence does not create a claim for damage to the product itself”); *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 486 (Ind. 2001) (holding that there is no recovery under the IPLA where a claim is based on damage to the defective product itself); *Miceli v. Ansell, Inc.*, 23 F. Supp. 2d 929, 933 (N.D. Ind. 1998) (denying a motion to dismiss a case a motion to dismiss in a case determining that Indiana recognizes that pregnancy may be considered a “harm” in certain circumstances); *see also* *Great N. Ins. Co. v. Buddy Gregg Motor Homes, Inc.*, No. IP 00-1378-C-H/K, 2002 U.S. Dist. LEXIS 7830, at *2 (S.D. Ind. Apr. 29, 2002) (holding that there was no recovery under the IPLA in a case involving a motor home destroyed in a fire allegedly caused by a defective wire in the engine compartment).

personalty at the time it is conveyed by the seller to another party.”⁴² The term does not apply to a “transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.”⁴³

D. “. . . a product in a defective condition unreasonably dangerous. . .”

Only products that are in a “defective condition” are ones for which IPLA liability may attach.⁴⁴ For purposes of the IPLA, a product is in a “defective condition” if

at the time it is conveyed by the seller to another party, it is in a condition:

- (1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and
- (2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption.⁴⁵

42. IND. CODE § 34-6-2-114(a).

43. *Id.* § 34-6-2-105(b). The most recent significant case in this area is *Baker v. Heye-America*, 799 N.E.2d 1135 (Ind. Ct. App. 2003), in which the court held that a worker injured by a bottle-making machine could recover under the IPLA as the “user” of a “product.” *Id.* at 1141. In support of its conclusion that the bottle-making machine was, in fact, a product for IPLA purposes, the court reasoned that the process undertaken when it was rebuilt was “a substantial and complicated one that resulted in a complex new machine that was significantly different from its parts.” *Id.* at 1141. According to the *Baker* court, “Heye-America did more than simply provide the service of restoring [the machine] from a damaged condition . . . [t]hrough an interactive process with [Baker’s employer], Heye-America designed and produced a custom product that it placed in the stream of commerce.” *Id.*

See also *R.R. Donnelley & Sons Co. v. N. Tex. Steel Co.*, 752 N.E.2d 112, 121-22 (Ind. Ct. App. 2001) (holding that a manufacturer of component parts of a steel rack system sold a product and did not merely provide services because it modified raw steel to produce the component parts and, in doing so, transformed the raw steel into a new product that was substantially different from the raw material used); *Marsh v. Dixon*, 707 N.E.2d 998, 1001-02 (Ind. Ct. App. 1999) (holding that an amusement ride involved the provision of a service and not the sale of a product); *Lenhardt Tool & Die Co. v. Lumpe*, 703 N.E.2d 1079, 1085-86 (Ind. Ct. App. 1998) (holding that defendant provided products and not merely services because it transformed metal block into “new” products and because it repaired damaged products, both of which created “new,” substantially different work product); *N.H. Ins. Co. v. Farmer Boy AG, Inc.*, No. IP 98-0031-C-T/G, 2000 U.S. Dist. LEXIS 19502, at *7-8 (S.D. Ind. Dec. 19, 2000) (holding that installation of a custom-fit electrical system into a hog barn involved wholly or predominately the sale of a service rather than a product); *Buddy Gregg*, 2002 U.S. Dist. LEXIS 7830, at *15 (holding that plaintiff could not pursue a negligent inspection claim separate and apart from the IPLA because no reasonable jury could determine that the allegedly negligent inspection occurred as part of a transaction for “services” that was separate from the purchase of a motor home).

44. IND. CODE § 34-20-2-1(1).

45. *Id.* § 34-20-4-1.

Recent cases confirm that establishing one of the foregoing threshold requirements without the other will not result in liability under the IPLA.⁴⁶

Claimants in Indiana may prove that a product is in a “defective condition” by asserting one or a combination of three theories: (1) the product has a defect in its design (a “design defect”); (2) the product lacks adequate or appropriate warnings (a “warnings defect”); or (3) the product has a defect that is the result of a malfunction or impurity in the manufacturing process (a “manufacturing defect”).⁴⁷

Although claimants are free to assert any of those three theories for proving that a product is in a “defective condition,” the IPLA provides explicit statutory guidelines identifying when products, as a matter of law, are not defective. Indiana Code section 34-20-4-3 provides that “[a] product is not defective under [the IPLA] if it is safe for reasonably expectable handling and consumption. If an injury results from handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under [the IPLA].”⁴⁸ In addition,

46. See *Baker*, 799 N.E.2d at 1140 (“[U]nder the IPLA, the plaintiff must prove that the product was in a defective condition that rendered it unreasonably dangerous.” (citing *Cole v. Lantis Corp.*, 714 N.E.2d 194, 198 (Ind. Ct. App. 1999))).

47. See *First Nat’l Bank & Trust Cop. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 689 (7th Cir. 2004); *Baker*, 799 N.E.2d at 1140; *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 161 (Ind. Ct. App. 1997).

48. IND. CODE § 34-20-4-3 (2005). One recent case discussing “reasonably expectable use” is an unpublished federal decision in *Hunt v. Unknown Chemical Manufacturer No. One*, No. IP 02-389-C-M/S, 2003 U.S. Dist. LEXIS 20138, at *1 (S.D. Ind. Nov. 5, 2003). There, Gary Hunt purchased lumber treated with chromium copper arsenate (“CCA”) from Furrow Building Materials. *Id.* at *3. The chemical treatment waterproofs lumber and protects it from damage from wood-boring insects. *Id.* at *2-3. Hunt used the wood primarily to construct a deck around a swimming pool. *Id.* at *4. He then sold the home to the plaintiffs, who tore down the deck, burned the wood in the backyard, and spread the ashes as fertilizer in the family garden. *Id.* at *3-4. Plaintiffs filed suit after learning “about the dangers resulting from exposure to CCA-treated wood.” *Id.* at *4.

Judge McKinney cited Indiana Code section 34-20-4-3 for the proposition that manufacturers (as defined by the IPLA) can only be held liable for injury or damage caused by a product’s reasonably expectable use. *Id.* at *27-28. He also recognized that Indiana cases such as *Wingett v. Teledyne Industries, Inc.*, 479 N.E.2d 51 (Ind. 1985), contemplate that some activities or actions relative to a product (demolition of ductwork in that case) are simply not foreseeable as a matter of law and, accordingly, are not “intended” or expected uses of the product. *Id.* at *28-29. Applying Indiana law to the facts before him, Judge McKinney recognized that the “intended use of the treated wood that . . . Hunt bought from Furrow was the construction of decks and other structures.” *Id.* at *31. He did “use the wood to construct and repair a swimming pool deck.” *Id.* at *32. That use was not, however, the basis of plaintiffs’ claim. Rather, the claims stemmed from the burning of the treated wood at issue. *Id.* Accordingly, Judge McKinney concluded that “[p]laintiffs’ destruction of the wood and their post-destruction use of the wood ashes as ‘fertilizer’ for the yard were not reasonably foreseeable uses of the product.” *Id.*

Indiana Code section 34-20-4-4 provides that “[a] product is not defective under [the IPLA] if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.”⁴⁹

In addition to the two specific statutory pronouncements identifying when a product is not “defective” as a matter of law, Indiana law also defines when a product may be considered “unreasonably dangerous” for purposes of the ILPA. A product is “unreasonably dangerous” only if its use “exposes the user or consumer to a risk of physical harm . . . beyond that contemplated by the ordinary user or consumer who purchases [it] with ordinary knowledge about the product’s characteristics common to consumers in the community.”⁵⁰ A product is not unreasonably dangerous as a matter of law if it injures in a way or in a fashion that, by objective measure, is known to the community of persons consuming the product.⁵¹

49. IND. CODE § 34-20-4-4.

50. *Id.* § 34-6-2-146; *see also Baker*, 799 N.E.2d at 1140; *Cole*, 714 N.E.2d at 199. In *Baker*, a panel of the Indiana Court of Appeals wrote that “[t]he question whether a product is unreasonably dangerous is *usually* a question of fact that must be resolved by the jury.” 799 N.E.2d at 1140 (emphasis added). Another panel wrote the same thing in *Vaughn v. Daniels Co.*, 777 N.E.2d 1128 (Ind. Ct. App. 2002) (citing *Cole*, 714 N.E.2d at 200). Those panels also seem to favor jury resolution in determining reasonably expected use. Indeed, the *Baker* opinion states that “reasonably expectable use, like reasonable care, involves questions concerning the ordinary prudent person, or in the case of products liability, the ordinary prudent consumer. The manner of use required to establish ‘reasonably expectable use’ under the circumstances of each case is a matter peculiarly within the province of the jury.” 799 N.E.2d at 1140 (citing *Vaughn*, 777 N.E.2d at 1128).

It would be incorrect, however, to conclude from those pronouncements that there exists something akin to a presumption that juries always *should* resolve whether a product is unreasonably dangerous or whether a use is reasonably expectable. Indeed, recent cases have resolved the defective and unreasonably dangerous issue as a matter of law in a design defect context even in the presence of divergent expert testimony. In *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893 (N.D. Ind. 2002), the plaintiff was injured when a blade guard on a circular table saw struck him in the eye after one of his co-workers left the guard in what appeared to be in the installed position. With respect to the defective design claims, plaintiff’s expert opined that the saw was defective and unreasonably dangerous by its design, suggesting that the saw could be designed so that the guard could be attached without tools or that the tools could be physically attached to the saw. *Id.* at 900. The court rejected the claim, holding that the plaintiff and his expert had “wholly failed to show a feasible alternative design that would have reduced the risk of injury.” *Id.* *See also* *Miller v. Honeywell Int’l, Inc.*, No. IP 98-1742 C-M/S, 2002 U.S. Dist. LEXIS 20478, at *1-4 (S.D. Ind. Oct. 15, 2002) (holding that Honeywell’s design specifications for planetary gears and gear carrier assembly within the engine of an Army UH-1 helicopter were not defective as a matter of law at the time the specifications were introduced into the stream of commerce).

51. *See Baker*, 799 N.E.2d at 1140; *see also Moss v. Crosman Corp.*, 136 F.3d 1169, 1174 (7th Cir. 1998) (writing that a product may be “dangerous” in the colloquial sense, but not “unreasonably dangerous” for purposes of IPLA liability). An open and obvious danger negates liability. “To be unreasonably dangerous, a defective condition must be hidden or concealed [and]

In cases alleging improper design or inadequate warnings as the theory for proving that a product is in a “defective condition,” recent decisions have quite clearly recognized that the substantive defect analysis (i.e., whether a design was inappropriate or whether a warning was inadequate) should *follow* a threshold analysis that first examines whether, in fact, the product at issue is “unreasonably dangerous.” Indeed, in two separate cases decided during the survey period, *Bourne v. Marty Gilman, Inc.*,⁵² (involving an alleged design defect) and *Conley v. Lift-All Co.*,⁵³ (involving an alleged warnings defect), Judge Hamilton followed that precise approach.

The ILPA provides that liability attaches for placing in the stream of commerce a product in a “defective condition”⁵⁴ even though: “(1) the seller has exercised all reasonable care in the manufacture and preparation of the product; and (2) the user or consumer has not bought the product from or entered into any contractual relation with the seller.”⁵⁵ What Indiana Code section 34-20-2-1 bestows, however, in terms of liability despite the exercise of “all reasonable care [i.e., fault],” section 34-20-2-2 then removes for two of the three operative theories used to show a defect. It eliminates the privity requirement between buyer and seller for imposition of liability and also confirms that a manufacturer’s or seller’s exercise of reasonable care eliminates liability in cases in which the theory of liability is based on a design warning defect:

[I]n an action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.⁵⁶

evidence of the open and obvious nature of the danger . . . negates a necessary element of the plaintiff’s prima facie case that the defect was hidden.” *Hughes v. Battenfeld Gloucester Eng’g Co.*, No. TH 01-0237-C T/H, 2003 U.S. Dist. LEXIS 17177, at *7-8 (S.D. Ind. Aug. 20, 2003) (quoting *Cole*, 714 N.E.2d at 199). In *Hughes*, the plaintiff injured his hand while separating and rethreading plastic film through a machine called a secondary treater nip station. Plaintiff admitted that he knew about the dangers associated with using the nip station because he observed co-workers who were injured performing similar tasks. *Id.* at *4. Plaintiff testified that he was aware of the alleged defect that caused his accident, and on two previous occasions he had filed written suggestions with his employer requesting that it reduce the risk of injury involved. *Id.* at *3-4. Judge Tinder held that the dangerous condition of the nip station was open and obvious as a matter of law and entered summary judgment. *Id.* at *17.

52. No. 1:03-cv-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at *1 (S.D. Ind. July 20, 2005).

53. No. 1:03-cv-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468, at *1 (S.D. Ind. July 25, 2005).

54. IND. CODE § 34-20-2-1(1) (2004).

55. *Id.* § 34-20-2-2.

56. *Id.*

Indiana practitioners and judges routinely have recognized that the post-1995 IPLA imposes a negligence standard in design and warnings cases, while retaining strict liability (liability despite the “exercise of all reasonable care”) for manufacturing defect cases.⁵⁷ Thus, just as in any other negligence case, a claimant advancing design or warning defect theories must satisfy the traditional negligence requirements—duty, breach, injury, and causation.⁵⁸

Many courts have recognized that the post-1995 IPLA imposes a negligence standard in design and warnings cases, while retaining strict liability (liability despite the “exercise of all reasonable care”) for manufacturing defect cases.⁵⁹ Even though Indiana is now ten years removed from the 1995 amendments to the IPLA, some courts and practitioners continue to use erroneous language implying that “strict liability” and/or “liability without regard to reasonable care” still applies to cases in which the operative theory of liability is based upon inadequate warnings or improper design.⁶⁰

57. See *Mesman v. Crane Pro Servs., Inc.*, a Div. of Konecranes, 409 F.3d 846, 849 (7th Cir.) (“Under Indiana’s products liability law, a design defect can be made the basis of a tort suit only if the defect was a result of negligence in the design.”), *reh’g and reh’g en banc denied* (7th Cir. 2005); *First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 691 n.7 (7th Cir. 2004); *Conley*, 2005 U.S. Dist. LEXIS 15468, at *12-13 (“The IPLA effectively supplants the plaintiff’s common law claims because all of his claims are brought by a user or consumer against a manufacturer for physical harm caused by a product. Plaintiff’s common law claims will therefore be treated as merged into the IPLA claims.”); *Bourne*, 2005 U.S. Dist. LEXIS 15467, at *9 n.2 (“[P]laintiffs may not pursue a separate common law negligence claim [for design defect]. Their negligence claim is not dismissed but is more properly merged with the statutory claim under the IPLA, which includes elements of negligence.”); *Birch v. Midwest Garage Door Sys.*, 790 N.E.2d 504, 518 (Ind. Ct. App. 2003).

58. *E.g.*, *Conley*, 2005 U.S. Dist. LEXIS 15468, at *13-14 (“To withstand summary judgment, Conley must come forward with evidence tending to show: (1) Lift-All had a duty to warn the ultimate users of its sling that dull or rounded load edges could cut an unprotected sling; (2) the hazard was hidden and thus the sling was unreasonably dangerous; (3) Lift-All failed to exercise reasonable care under the circumstances in providing warnings; and (4) Lift-All’s alleged failure to provide adequate warnings was the proximate cause of his injuries.”).

59. See, *e.g.*, *Inlow II*, 378 F.3d at 690 n.4 (“Both Indiana’s 1995 statute (applicable to this case) and its 1998 statute abandoned strict liability in design defect and failure to warn cases. Hence, unlike manufacturing defects, for which manufacturers are still held strictly liable, claims of design defect and failure to warn must be proven using negligence principles.”); *Miller v. Honeywell Int’l Inc.*, No. IP 9-1742-C-M/S, 2002 U.S. Dist. LEXIS 20478, at *38 (S.D. Ind. Oct. 15, 2002), *aff’d*, 2004 U.S. Dist. LEXIS 15261 (7th Cir. July 21, 2004); *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 899-900 (N.D. Ind. 2002); *Kennedy v. Guess, Inc.*, 765 N.E.2d 213, 220 (Ind. Ct. App. 2002).

60. A recent example is found in *Ziliak v. AstraZeneca LP*, 324 F.3d 518 (7th Cir. 2003). Although not relevant to the court’s ultimate decision, the *Ziliak* decision proclaimed that “manufacturers are *strictly liable* to consumers for injuries caused by defective or unreasonably dangerous products placed in the stream of commerce.” *Id.* at 521 (emphasis added). A few

1. *Design Defect Theory*.—Decisions that address substantive design defect allegations in Indiana require plaintiffs to prove the existence of what practitioners and judges often refer to as a “safer, feasible alternative” design.⁶¹ Plaintiffs must demonstrate that another design not only could have prevented the injury but that the alternative design was effective, safer, more practicable, and more cost-effective than the one at issue.⁶² One panel of the Seventh Circuit (Judge Easterbrook writing) has described that a “design-defect claim in Indiana is a negligence claim, subject to the understanding that negligence means failure to take precautions that are less expensive than the net costs of accidents.”⁶³

Indiana’s requirement of proof of a safer, feasible alternative design is

sentences later, the court again incorporated strict liability into its analysis: “AstraZeneca is absolved of *strict liability* so long as it has imparted adequate warnings to treating physicians.” *Id.* (emphasis added). In support of its strict liability assumption, the *Ziliak* court cited Indiana Code section 34-20-2-1. *Id.* Because *Ziliak*’s cause of action accrued in November 1998, there is no question that the case is governed by the current version of the IPLA, which was enacted in 1995. Although, as the *Ziliak* court recognized, it is true that the “rule of liability” established by Indiana Code section 34-20-2-1 applies even though a seller has exercised all reasonable care in the manufacture and preparation of the product (the rule of strict liability), Indiana Code section 34-20-2-2 eliminates the rule of strict liability in all cases in which the theory of liability is inadequate warnings or improper design. *See also* Alberts & Bria, *supra* note 26, at 1247.

Smock Materials Handling Co. v. Kerr, 719 N.E.2d 396, 405-06 (Ind. Ct. App. 1999), is another case in which the Indiana Court of Appeals found no error in the trial court’s use of the term “strict liability” in its instructions to the jury even though the case was not limited to manufacturing defects.

Practitioners should note that the Indiana Pattern Jury Instructions do not adequately distinguish between the operative theories to which a negligence standard applies (warning defect and design defect) and the operative theory to which a strict liability standard applies (manufacturing defect). Specifically, Indiana Pattern Instruction 7.04 does not track Indiana Code section 34-20-2-2, which requires an IPLA claimant utilizing a design or warning defect theory to establish that “the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.”

61. In cases alleging improper design to prove that a product is in a “defective condition,” the substantive defect analysis may need to follow a threshold “unreasonably dangerous” analysis if one is appropriate. *E.g.*, *Bourne*, 2005 U.S. Dist. LEXIS 15467, at *10-20.

62. *See Burt*, 212 F. Supp. 2d at 900; *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995). The plaintiff in *Burt* was injured when a blade guard on a circular table saw struck him in the eye after one of his co-workers left the guard in what appeared to be the installed position. With respect to his design claims, plaintiff’s expert suggested that the saw could be designed so that the guard could be attached without tools or that the tools could be physically attached to the saw. 212 F. Supp. 2d at 900. The court rejected the claim, holding that the plaintiff had “wholly failed to show a feasible alternative design that would have reduced the risk of injury.” *Id.*; *see also Miller*, 2002 U.S. Dist. LEXIS 20478, at *66 (finding that design defect theory required proof of an alternative design that was effective, safer, more practicable, and more cost-effective than the one at issue).

63. *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 657 (7th Cir. 1998).

similar to what a number of other states require in the design defect context. Indeed, that requirement is reflected in Section 2(B) of the Restatement (Third) of Torts and the related comments.⁶⁴ In the specific context of the IPLA, it is clear that design defects in Indiana are judged using a negligence standard. As such, a claimant can hardly find a manufacturer negligent for adopting a particular design unless he or she can prove that a reasonable manufacturer in the exercise of ordinary care would have adopted a different and safer design. The claimant must prove that the safer, feasible alternative design was in fact available and that the manufacturer unreasonably failed to adopt it.⁶⁵

In addition, the IPLA adopts comment k of the Restatement (Second) of Torts for all products and, by statute, “a product is not defective . . . if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.”⁶⁶ Thus, a manufacturer technically cannot make the “comment k” statutory defense available until and unless the claimant demonstrates a rebuttal to it. That raises interesting questions in light of Indiana’s quirky treatment of Trial Rule 56 under *Jarboe v. Landmark Community Newspapers of Indiana, Inc.*⁶⁷ In federal court under a *Celotex*⁶⁸ standard, a manufacturer may file a summary judgment motion based upon the “comment k” defense, challenging the claimant to rebut the defense through properly designated proof of feasible alternative design. Under Indiana’s treatment of Rule 56, however, the manufacturer bears the burden of affirmatively showing the unavailability of the safer, feasible alternative design. Nevertheless, and regardless of the procedure governing the motion itself, the claimant still must prove the existence of a safer, feasible alternative design to rebut the IPLA’s “comment k” defense.

State and federal courts applying Indiana law have been busy in recent years addressing design defect claims. In *Baker v. Heye-America*,⁶⁹ a panel of the Indiana Court of Appeals held that fact issues precluded summary judgment with respect to, among other issues, whether the placement of, and lack of a guard for, a maintenance stop button rendered a glass molding machine defective or unreasonably dangerous or both.⁷⁰ In *Lyle v. Ford Motor Co.*,⁷¹ another panel

64. RESTATEMENT (THIRD) OF TORTS § 2(B) (1998).

65. To excuse that requirement would be tantamount to excusing the reasonable care statutory component of design defect liability. By way of example, a manufacturer could not be held liable under the IPLA for adopting design “A” unless there was proof that through reasonable care the manufacturer would have instead adopted design “B.” To make that case, a claimant must show the availability of design “B” as an evidentiary predicate to establish before proceeding to the other “reasonable care” elements.

66. IND. CODE § 34-20-4-4 (2005).

67. 644 N.E.2d 118 (Ind. 1994).

68. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

69. 799 N.E.2d 1135 (Ind. Ct. App. 2003).

70. *Id.* at 1145.

71. 814 N.E.2d 301 (Ind. Ct. App.), *reh’g denied* (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 745 (Ind. 2005).

of the Indiana Court of Appeals held, among other things, that the theories offered by plaintiffs' opinion witnesses regarding the inadvertent unlatching of a seatbelt were not reliable⁷² and that designated evidence failed to show that Ford's seatbelt design was defective or unreasonably dangerous.⁷³

Federal courts issued two important opinions during the survey period in design defect cases. The first case, *Bourne v. Marty Gilman, Inc.*,⁷⁴ Judge David Hamilton held that a goal post that fell and injured a college student during a post-game celebration was not unreasonably dangerous as a matter of law.⁷⁵ After the Ball State University football team won an upset victory against the University of Toledo in October 2001, hundreds of fans, including plaintiff Andrew Bourne, ran onto the field to celebrate.⁷⁶ Many of the fans in the crowd were pushing and pulling at one of the goal posts in an effort to bring it down.⁷⁷ Some fans climbed onto the goal post and began rocking it.⁷⁸ Bourne said that he walked under the goal post and jumped up to swat it, but missed.⁷⁹ He then started walking toward the other end of the field with his back to the goal post.⁸⁰ He heard a snap, felt an impact across his back, and suffered a broken leg and a spinal injury.⁸¹

Bourne and his parents sued the manufacturer of the goal post, Marty Gilman, Inc. ("Gilman"), claiming that it was improperly designed.⁸² Gilman has manufactured goal posts since 1960 and Ball State has used Gilman "slingshot" style goal posts since at least the mid 1990s.⁸³ The slingshot goal post uses a single vertical stem supporting a horizontal cross bar and two vertical upright posts. The vertical stem curves to allow its base to be set back from the playing

72. *Id.* at 312.

73. *Id.* The Indiana Supreme Court denied transfer in April 2005.

74. No. 1:03-cv-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at *1 (S.D. Ind. July 20, 2005).

75. *Id.* at *2.

76. *Id.* at *1. Andrew Bourne did not have a ticket to the game. *Id.* at *3. He spent most of the game "tailgating" outside the stadium. *Id.* Bourne and his friends entered the stadium without tickets late in the fourth quarter. *Id.* at *3-4. When it was apparent that Ball State was going to win the game, the scoreboard operator saw fans gathering and expected them to tear down the goal posts. *Id.* at *3. She caused a pre-programmed message to appear on the scoreboard that read "'the goal posts look lonely' or words to that effect." *Id.* The message was intended to encourage fans to enter the field and tear down the goal posts." *Id.* Ball State did not have any security personnel or other measures in place to prevent or discourage fans from running onto the field as the game ended. *Id.* at *4. Bourne and his parents reached a separate settlement with Ball State University. *Id.* at *1.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at *5.

82. *Id.* at *1.

83. *Id.* at *5.

field.⁸⁴ Gilman goal posts at issue weigh approximately 470 pounds and are forty feet tall.⁸⁵ The cross-bar is 18.5 feet wide and ten feet above the ground. The two vertical posts are thirty feet long.⁸⁶

In 1985 when it took over production from the original designer, Gilman changed the metal alloy used to build the goal post model at issue.⁸⁷ The new metal was described as “softer” and less resistant to bending than the older model.⁸⁸ Gilman switched to the softer metal because its specialized bending machine could not satisfactorily bend the older alloy to create the curved vertical stem.⁸⁹

Gilman knew that celebrating fans tear down goal posts.⁹⁰ Gilman also knew “that the main stem of its own slingshot style goal posts could ‘snap’ under the weight of celebrating fans” and “that fans standing on the field when goal posts are being torn down are at risk of injury.”⁹¹ In 1996 and again in 2000, Ball State fans tore down the Gilman goal posts.⁹² In those previous instances, the goal posts broke at the vertical stem, just above the anchor plate at its base.⁹³ The goal post that fell on Bourne was the same as the ones that fell in 1996 and 2000, and it broke in the same location as did the ones in 1996 and 2000.⁹⁴ Gilman conceded that the vertical stem just above the anchor plate is the weakest point on the goal post and is, historically, where its “goal posts tend to break under the weight of fans.”⁹⁵

Other goal post designs existed before Bourne’s injury, including a “hinged” goal post that can be lowered to the ground at the end of a game, a goal post with a double vertical stem to increase strength and improve weight distribution, and a variety of and others described as “fan resistant” or “indestructible” because they are made from structural steel instead of aluminum and are based in an “underground concrete footer rather than bolted at ground level.”⁹⁶

Bourne and his parents contended that the new alloy Gilman used was prone to fracture under the weight of celebrating fans and that Gilman should have utilized one of the alternative goal post designs mentioned above.⁹⁷ Gilman

84. *Id.* The “slingshot” style goal post was developed in 1969. *Id.* It replaced the older “H” style goal post, which used two vertical support posts in or on the edge of the playing field. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at *5-6.

88. *Id.* at *6.

89. *Id.*

90. *Id.* at *7. “Gilman was aware that sixteen sets of college football goal posts were torn down by fans in 2000, ten goal posts in 2001, seventeen in 2002, and twelve in 2003.” *Id.*

91. *Id.* at *7.

92. *Id.* at *7-8.

93. *Id.* at *8.

94. *Id.*

95. *Id.*

96. *Id.* at *8-9.

97. *Id.* at *19-20.

countered by arguing that its goal post was neither defective nor unreasonably dangerous as a matter of Indiana law because the danger Bourne and other bystanders faced was “open and obvious.”⁹⁸

Judge Hamilton agreed with Gilman, determining that the goal post was not unreasonably dangerous as a matter of law.⁹⁹ Judge Hamilton’s decision first recognized that the term “unreasonably dangerous” for purposes of IPLA liability “refers to any situation in which the use of a product exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer who purchases the product with the ordinary knowledge about the product’s characteristics common to the community of consumers.”¹⁰⁰ Citing *Lovell v. Marion Power Shovel Co.*¹⁰¹ and *Welch v. Scripto-Tokai Corp.*,¹⁰² Judge Hamilton pointed out that “whether a defect is open and obvious is relevant to the inquiry into whether a product was unreasonably dangerous.”¹⁰³ Indeed, under Indiana law, “a defective condition must be hidden or concealed” to be considered unreasonably dangerous; “[i]f a defective condition is open and obvious, then it does not present a risk of injuries ‘different in kind’ from those the average user might anticipate.”¹⁰⁴ “The test is an objective one, based upon what the user or consumer should have known.”¹⁰⁵

In *Bourne*, the court agreed as a matter of law that “an objective person would have been well aware of the dangers that [Bourne] faced by standing in the area of a goal post being rocked by college students”:

First, as an objective matter, any reasonable observer on the scene would have recognized the danger that the goal post would fall under the weight of the fans climbing on it and rocking it back and forth. Pulling down the goal post is what Ball State effectively invited and expected the fans to do. Bourne himself testified that he was not surprised the goal post came down.

Second, the risk that a person might be hurt by a 40-foot tall metal structure falling under the weight of a dozen or more people was obvious, as a matter of law, to any reasonable observer on the scene.

98. *Id.* *12.

99. *Id.* at *20.

100. *Id.* at *11-12 (internal quotation marks omitted) (quoting IND. CODE § 34-6-2-146 (2004)). Because “consumer” for purposes of the IPLA includes a bystander “injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use,” a student such as Bourne who rushed the field at the end of the game was a “consumer” of the goal post. *Id.* (citing IND. CODE § 34-6-2-29 (2004)).

101. 909 F.2d 1088, 1090-91 (7th Cir. 1990).

102. 651 N.E.2d 810, 815 (Ind. Ct. App. 1995).

103. *Bourne*, 2005 U.S. Dist. LEXIS 15467, at *12.

104. *Id.* (internal quotation marks omitted) (quoting *Cole v. Lantis Corp.*, 714 N.E.2d 194, 199 (Ind. Ct. App. 1999)).

105. *Id.* (citing *Schooley v. Ingersoll Rand, Inc.*, 631 N.E.2d 932, 939 (Ind. Ct. App. 1994)).

The test of unreasonable danger is an objective one. The court “must take into account ‘the reasonably anticipated knowledge, perception, appreciation, circumstances, and behavior of expected users.’”¹⁰⁶

Judge Hamilton noted that Indiana courts have a history of deciding as a matter of law that products are not unreasonably dangerous in cases involving “similarly obvious dangers,” such as the danger posed by a butane cigarette lighter,¹⁰⁷ “the risk that a running rotary lawnmower blade would cut a hand stuck beneath the mower,”¹⁰⁸ “the risk that a metal crane would conduct electricity from overhead wires to injure or kill the operator,”¹⁰⁹ “and the danger that a BB gun would injure a person shot with it.”¹¹⁰ In *Bourne*, “[b]ystanders on the scene saw a 40-foot tall structure of metal pipes with a dozen or more adults climbing on it and bouncing and rocking it back and forth with the obvious intent to cause it to fall.”¹¹¹ As such, “[t]he court determined that the risk of injury to those below the goal post was obvious as a matter of law.”¹¹²

That *Bourne* “thought he was in a safe position because he had seen goal posts come down slowly on television” was unpersuasive because such a contention “does not address the fact that the test is an objective one.”¹¹³ Similarly, the court rejected plaintiffs’ argument “that a reasonable person on the scene could have expected that the goal post would come down slowly” rather than snapping as the Gilman post did.¹¹⁴ Using *Moss* and *Anderson* as illustrations, Judge Hamilton explained that such an argument “seeks to require more specific awareness of the degree of risks than Indiana law actually requires.”¹¹⁵ According to Judge Hamilton,

106. *Id.* at *13 (footnote and internal citation omitted) (quoting *Moss v. Crosman Corp.*, 136 F.3d 1169, 1175 (7th Cir. 1998)).

107. *Id.* at *14 (citing *Welch v. Scripto-Tokai Corp.*, 651 N.E.2d 810, 814 (Ind. Ct. App. 1995)).

108. *Id.* (citing *Ragsdale v. K-Mart Corp.*, 468 N.E.2d 524, 527 (Ind. Ct. App. 1984)).

109. *Id.* (citing *Anderson v. P.A. Radocy & Sons, Inc.*, 67 F.3d 619, 624-26 (7th Cir. 1995)).

110. *Id.* (citing *Moss*, 136 F.3d at 1175).

111. *Id.* at *15.

112. *Id.*

113. *Id.* at *16.

114. *Id.*

115. *Id.* In *Moss*, a child was killed when another child shot him in the eye with a BB gun. *Id.* “The victim’s parents[, who] sued the gun’s manufacturer . . . conceded that a reasonable person would understand that the gun could injure someone, [though] they argued that a reasonable person would not expect that the danger could be fatal.” *Id.* “The Seventh Circuit affirmed summary judgment for the manufacturer because the difference was one only of degree.” *Id.* “The fact that a reasonable person would understand the general type of risk was enough to show that the product was not unreasonably dangerous.” *Id.*

“*Moss* followed the reasoning of *Anderson*,” in which an electrician was electrocuted when his metal crane and bucket contacted overhead electrical wires. *Id.* at *16. “Plaintiffs acknowledged that reasonable [consumers] (and the decedent himself) would understand there was

the general danger that a tall structure of metal pipes could injure someone as it fell under the weight of fans was objectively obvious to a reasonable bystander. The fact that Bourne's injuries were so serious is very unfortunate. But his injuries are not different from the general type of injury that a reasonable bystander would understand.¹¹⁶

Bourne is a significant decision because it reinforces at least three important points for Indiana product liability practitioners: (1) "defective condition" and "unreasonably dangerous" are not interchangeable terms; (2) the concept of "open and obvious" remains quite relevant in Indiana product liability law even though it is no longer a stand-alone defense; and (3) whether a product presents an unreasonable danger can and should, under the proper circumstances, be decided by the court as a matter of law rather than automatically defaulted to the jury.

First, the *Bourne* decision reminds practitioners that "defective condition" and "unreasonably dangerous" are not interchangeable terms under the IPLA. In this regard, that the published Lexis case summary indicates that the court held that the goal post was not defective under Indiana law is an unfortunate characterization of the holding. In point of fact, the court held that the goal post did not present an unreasonable danger to the plaintiff because the risk of serious injury associated with students climbing on and rocking the goal post during the celebration were open and obvious to an objective person.¹¹⁷

IPLA liability does not attach unless the defective condition arising from an improper design, an inadequate warning, or a manufacturing flaw *also* renders the product unreasonably dangerous as judged by an "objective person" standard.¹¹⁸ Recent cases confirm that establishing one of the foregoing

a risk of electrical shock." *Id.* at *16-17. "They argued[, however,] that this understanding did not reach so far as to include the possibility of a fatal electrocution." *Id.* at *17. "The Seventh Circuit rejected the argument, affirming summary judgment for the crane manufacturer":

The question becomes whether the difference between an electrical shock and electrocution is one of kind or degree. We answer that the difference is one of degree. Anderson experienced an initial shock of electricity while standing in the metal basket attached to the steel crane. He was aware that an amount of electricity could surge through his person. The fact that a fatal amount of electricity surged through him is a matter of degree, not a matter of a completely different injury.

Id. (internal quotation marks omitted) (quoting *Anderson v. P.A. Radocy & Sons, Inc.*, 67 F.3d 619, 625 (7th Cir. 1995)).

116. *Id.*

117. *See id.* at *13.

118. IND. CODE § 34-20-4-1 (2005); *see supra* notes 44-46 and accompanying text. The IPLA defines when a product may be considered "unreasonably dangerous" for purposes of Indiana Code section 34-20-4-1(2). A product is "unreasonably dangerous" only if its use exposes the user or consumer to a risk of physical harm beyond that contemplated by the ordinary user or consumer who purchases it with ordinary knowledge about the product common to consumers in the community. *See* IND. CODE § 34-6-2-146 (2005). A product is not unreasonably dangerous as a

threshold requirements without the other will not result in liability under the IPLA.

As Judge Hamilton recognized, there was evidence in *Bourne* suggesting the existence of stronger goal post designs and the court assumed “for purposes of summary judgment that there were safer designs available at the time of the sale of this goal post to Ball State.”¹¹⁹ Nevertheless, “a manufacturer is not obliged to build the safest possible product, at least where the danger in question is known to a reasonable consumer” and Gilman was “not required to sell only the safest goal post design, at least where the risk of injury is apparent to a reasonable bystander.”¹²⁰

Second, as the *Bourne* decision makes clear, the concept of “open and obvious” remains viable even though it is no longer a stand-alone defense. Indeed, some courts have described the “open and obvious rule” as having been “abrogated” by *Koske v. Townsend Engineering Co.*¹²¹ As Judge Hamilton recognized in *Bourne*, *Koske* eliminated the “open and obvious rule” only to the extent that it existed as a stand-alone defense “under earlier product liability law.”¹²² Nevertheless, “open and obvious” considerations “remain relevant in determining whether a product is ‘unreasonably dangerous,’ meaning it is in a condition that ‘exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer.’”¹²³ As such, the “open and obvious” concept continues to provide “helpful guidance on Indiana law as to when a product is unreasonably dangerous.”¹²⁴

Practitioners and judges in Indiana should not confuse application of the “open and obvious” concept for purposes of determining unreasonable danger (as occurred in *Bourne*) with its application for purposes of evaluating the IPLA’s statutory defenses. The “open and obvious” concept does not readily lend itself,

matter of law if it injures in a way or in a fashion that, by objective measure, is known to the community of persons consuming the product. *See Baker v. Heye-America*, 799 N.E.2d 1135, 1140 (Ind. Ct. App. 2003); *see also Moss*, 136 F.3d at 1174 (noting that a product may be “dangerous” in the colloquial sense, but not “unreasonably dangerous” for purposes of IPLA liability).

119. *Bourne*, 2005 U.S. Dist. LEXIS 15467, at *19-20.

120. *Id.* at *20 (citing *Welch v. Scripto-Tokai Corp.*, 651 N.E.2d 810, 815 n.5 (Ind. Ct. App. 1995) (noting that “if a product is not dangerous to an extent beyond that contemplated by the ordinary consumer, the fact that the product could have been made safer does not establish liability”)). The *Bourne* decision is similar to Judge Tinder’s decision in *Hughes v. Battenfeld Gloucester Engineering Co.*, No. TH01-0237-C T/H, 2003 U.S. Dist. LEXIS 17177, at *7-8 (S.D. Ind. Aug. 20, 2003). *See supra* note 51.

121. 551 N.E.2d 437, 441 (Ind. 1990).

122. *Bourne*, 2005 U.S. Dist. LEXIS 15467, at *14 n.5.

123. *Id.* (citing IND. CODE § 34-6-2-146). Although recognizing that football goal posts are designed to gauge the accuracy of kickers, Judge Hamilton assumed that goal post manufacturers reasonably should expect that fans occasionally will try to tear them down. Accordingly, the statutory affirmative defense of misuse did not apply. *See* IND. CODE § 34-20-6-4 (2004).

124. *Bourne*, 2005 U.S. Dist. LEXIS 15467, at *14 n.5.

for example, to application in the context of the IPLA's "misuse" defense.¹²⁵ Although Judge Hamilton in *Bourne* recognized that football goal posts are designed specifically to gauge the accuracy of kickers, he assumed that goal post manufacturers reasonably should expect that fans occasionally would try to tear them down.¹²⁶ As such, the misuse defense did not apply.¹²⁷

In contrast, however, the "open and obvious" concept often readily applies in the context of the IPLA's "incurred risk" defense.¹²⁸ When applying the "open and obvious" concept in the context of the "incurred risk" defense, the current debate centers around the extent to which the open and obvious nature of a risk of which an injured user or consumer is specifically aware constitutes an "incurred risk" as a matter of law, thus eliminating any IPLA liability and effecting a "complete defense." Several Indiana appellate cases have recently held that a claimant who incurs a risk under the foregoing circumstances is precluded from IPLA recovery. That issue has been brought to the fore once again by *Mesman v. Crane Pro Services, a Division of Konecranes, Inc.*¹²⁹

It is important for practitioners and judges in Indiana to recognize that *Bourne* and *Mesman* construe the "open and obvious" concept in two very different ways. *Bourne* construes the concept in the context of determining unreasonable danger as a matter of law; *Mesman* construes the concept in the context of determining the extent to which a claimant might be foreclosed from recovery under the auspices of the "incurred risk" defense.

Third, *Bourne* stands for the proposition that judges can and should decide as a matter of law that a product is not "unreasonably dangerous" for purposes of IPLA liability when undisputed facts demonstrate that the risks it presents are objectively obvious. Citing a case applying Indiana product liability law from the early 1980s, the plaintiffs in *Bourne* argued that whether a product is "unreasonably dangerous" is a question for the jury and should not be decided as a matter of law.¹³⁰ Judge Hamilton rejected such a premise, recognizing

125. IND. CODE § 34-20-6-4 (2005).

126. *Bourne*, 2005 U.S. Dist. LEXIS 15467, at *11 n.3.

127. *Id.*

128. *See* IND. CODE § 34-20-6-3 (2005).

129. 409 F.3d 846 (7th Cir.), *reh'g and reh'g en banc denied* (7th Cir. 2005); *see infra* Part IV.A.

130. Plaintiffs cited *Corbin v. Coleco Industries, Inc.*, 748 F.2d 411 (7th Cir. 1984), in which the Seventh Circuit reversed summary judgment for a manufacturer of an above-ground pool. *Id.* at 412. The plaintiff had assembled the four-foot deep pool and then dived into it. He broke his neck and was permanently paralyzed. The Seventh Circuit determined that a fact issue precluded judgment as a matter of law concerning whether a warning was required. *Id.* at 417-18. In doing so, the *Corbin* court wrote that "[w]hether a product is in an unreasonably dangerous defective condition is a question of fact." *Id.* at 419. As Judge Hamilton noted, the Seventh Circuit in *Corbin* also relied on evidence that the pool contained a feature that made it deceptively dangerous. *Bourne*, 2005 U.S. Dist. LEXIS 15467, at *19. The plaintiff in *Corbin* had intended to make a flat, shallow dive, but there was evidence that the side of the pool was weak and would wobble under the pressure of a dive, so as to throw the diver off balance unexpectedly. *Corbin*, 748 F.2d at 420.

Indiana product liability cases decided in the two decades since *Corbin* “shows that the question may be decided in a proper case as a matter of law, especially if the alleged danger is open and obvious, as with the risk that a lighter will start fires [*Welch*], the risk that a running lawnmower blade will injure a hand stuck underneath the mower [*Ragsdale*], and the risk that a BB gun will injure [*Moss*].”¹³¹

Practitioners and judges often default to the idea that juries must determine whether a product is “unreasonably dangerous” or whether a use is “reasonably expectable.” As *Bourne* reminds practitioners and judges, that kind of automatic default should not exist in every product liability case. Indeed, judges in several recent cases have had no problem resolving such issues as a matter of law, even in the presence of divergent expert testimony.¹³²

The other important design defect case addressed by the federal courts during the survey period is *Mesman v. Crane Pro Services, a Division of Konecranes, Inc.*¹³³ Plaintiff John Mesman, a worker at a plant that manufactured steel products, suffered serious leg injuries when a load of steel sheets that a crane was unloading from a boxcar fell on him. The plant at which Mesman worked used the crane to unload steel sheets from railcars.¹³⁴ The crane had a beam called the “bridge,” which was fastened to the plant’s ceiling directly above the rail siding.¹³⁵ The crane also had a hoist, suspended from the beam, which the crane operator could move up and down and sideways along the bridge.¹³⁶ In addition, the crane had a “spreader beam” connected to the hoist, as well as chains connecting each end of the spreader beam to “scoops” for gripping loads.¹³⁷

Before the accident, Konecranes evaluated the design and operation of the crane and made several changes. First, it substituted for the controls in the operator’s cab a hand-held remote-control device with which the operator would operate the crane from ground level.¹³⁸ To raise the load he would press the up button on the device and to lower it he would press the down button.¹³⁹ Second, Konecranes installed alongside the up and down buttons on the remote-control device an emergency stop button, which the operator could press if he or she

There was no comparable evidence in *Bourne*. *Bourne*, 2005 U.S. Dist. LEXIS 15467, at *19.

131. *Bourne*, 2005 U.S. Dist. LEXIS 15467, at *19.

132. See *supra* note 50 (describing *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893 (N.D. Ind. 2002) and *Miller v. Honeywell Int’l, Inc.*, No. IP 98-1742 C-M/S, 2002 U.S. Dist. LEXIS 20478 (S.D. Ind. Oct. 15, 2002)); see also *Alberts & Bria, supra* note 26, at 1267-69. *Hughes v. Battenfeld Gloucester Engineering Co.*, No. TH 01-1237-C-T/H, 2003 U.S. Dist. LEXIS 17177 (S.D. Ind. Aug. 20, 2003), reached a similar result. See *supra* note 51.

133. 409 F.3d 846 (7th Cir.), *reh’g and reh’g en banc denied* (7th Cir. 2005).

134. *Id.* at 847.

135. *Id.* at 848.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

“sensed an impending collision between the load and the cab.”¹⁴⁰ The operator could also reverse the direction of the hoist by pressing the “down” button on the remote.¹⁴¹ Because, however, “the up and down control had a deceleration feature to reduce wear and tear on the crane, the spreader beam would continue to rise for three seconds after the down button was pressed.”¹⁴² In those three seconds, the beam would still travel about a foot until it stopped and began its reverse motion.¹⁴³

According to the *Mesman* court, Konecranes’s alterations did not change the fact that there was only a foot or two of clearance between the rim of the boxcar and the cab overhead when a boxcar was being unloaded underneath the section of the bridge to which the cab was attached.¹⁴⁴ As such, there existed the possibility that a load of steel could be jarred loose and could fall on anyone standing beneath it if the spreader beam struck the cab while being lifted by the hoist.¹⁴⁵

On the day of the accident, the crane operator was standing about twenty feet away from a boxcar that was underneath the empty cab.¹⁴⁶ Mesman was standing in the boxcar as he “fastened a load of steel sheets to the scoops beneath the crane’s spreader beam.”¹⁴⁷ The operator pressed the “up” button on the remote controller, causing the beam and the load to rise.¹⁴⁸ The operator “saw that the spreader beam was going to hit the cab, but instead of pressing the emergency-stop button, . . . he [mistakenly] pressed the down button.”¹⁴⁹ “Because of the deceleration feature . . . and the narrow clearance between the cab and the rim of the boxcar, the beam continued to rise for three seconds,” hitting the cab and causing the load to fall on Mesman.¹⁵⁰

Mesman and his wife sued Konecranes.¹⁵¹ A jury determined that the crane operator’s mistake was the principal cause of the accident, assigning two-thirds of the responsibility for the accident to the operator’s employer.¹⁵² The jury also found that Konecranes’s renovated crane design also contributed to the accident, assigning one-third of the responsibility to Konecranes.¹⁵³ According to the *Mesman* court, the accident would have been avoided “with certainty” if

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 849.

145. *Id.*

146. *Id.* at 848.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 847. The Mesmans originally sued in state court; Konecranes removed the case to the United States District Court for the Northern District of Indiana. *Id.*

152. *Id.* at 848.

153. *Id.* at 848-49.

Konecranes had removed the cab or eliminated the deceleration feature.¹⁵⁴ The accident might also have been avoided had Konecranes modified the limit switch so that the limit could be lowered when a load was being unloaded beneath the cab.¹⁵⁵

The jury awarded the Mesmans a large verdict, but the judge set it aside and entered judgment for Konecranes.¹⁵⁶ The judge alternatively decided that Konecranes was, at the very least, entitled to a new trial because the jury had been confused by irrelevant evidence and had ignored critical instructions.¹⁵⁷

The *Mesman* court (Judge Posner writing) described a negligent design as one in which “the product could have been redesigned at a reasonable cost to avoid the risk of injury.”¹⁵⁸ According to the *Mesman* court, “the risk of injury has to be weighed against the cost of averting it.”¹⁵⁹ Citing Judge “Learned Hand’s influential negligence formula” set forth in *United States v. Carroll Towing Co.*,¹⁶⁰ the court noted that

failure to take a precaution is negligent only if the cost of the precaution . . . is less than the probability of the accident that the precaution would have prevented multiplied by the loss that the accident if it occurred would cause; hence the formula: $B < PL$ The cheaper the precaution, the greater the risk of accident, and the greater the harm caused by the accident, the likelier it is that the failure to take the precaution was negligent.¹⁶¹

In light of the facts presented in *Mesman*, the court viewed as “substantial” the risk of a heavy load falling on a worker if the spreader beam struck the cab

154. *Id.* at 849. Because the crane could be operated from ground level with a remote, the cab was no longer used. Konecranes’s decision not to remove the cab and thereby eliminate the danger of its being struck by the spreader beam was one of the design decisions that were claimed to have rendered the crane defective. *Id.* at 848. In addition, Konecranes built into the renovated crane a limit switch that would automatically stop the spreader beam from rising when it came too near the bridge. The switch, however, was set to prevent the spreader beam from touching the bridge where the cab was *not* attached. To prevent the spreader beam from touching the cab, the limit would have had to be set much lower, too low for convenient unloading of boxcars that were underneath any other section of the bridge. *Id.* at 848.

155. *Id.* at 849. Whether or not an adjustable limit switch would have prevented the accident was less certain because, according to the court, the operator “might have forgotten to adjust it.” *Id.*

156. *Id.* at 847.

157. *Id.*

158. *Id.* at 849 (citing *Weir v. Crown Equip. Corp.*, 217 F.3d 453, 460-61 (7th Cir. 2000); *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 657 (7th Cir. 1998); *Navarro v. Fuji Heavy Indus., Ltd.*, 117 F.3d 1027, 1031 (7th Cir. 1997); *Miller v. Todd*, 551 N.E.2d 1139, 1141 (Ind. 1990); *Stamper v. Hyundai Motor Co.*, 699 N.E.2d 678, 689 (Ind. Ct. App. 1998)).

159. *Id.*

160. 159 F.2d 169, 173 (2d Cir. 1947).

161. *Mesman*, 409 F.3d at 849 (internal citations omitted).

because: (1) there was a “narrow clearance under the section of the bridge to which the crane was attached”; and (2) “if the load did fall on someone it would be likely to kill or seriously injure him.”¹⁶² And, according to the *Mesman* court, the substantial risk could have been avoided “at little cost simply by removing the cab,” which no longer had a function.¹⁶³

Konecranes defended the case by arguing that the crane operator exposed Mesman to a danger that was “open and obvious.” That portion of the court’s analysis is properly addressed below in the context of the “incurred risk” defense.¹⁶⁴ In the context of the allegedly defective design allegations, the specific question before the court was “whether there was a sufficient likelihood that the operator of the rebuilt crane would fail to press the emergency-stop button when he saw the spreader beam about to hit the cab.”¹⁶⁵ The *Mesman* court found that the jury should have been instructed to focus upon that question and that “[t]he answer would depend on the likelihood of the kind of mistake that [the crane operator] made and the cost and efficacy of additional precautions, such as removing the cab.”¹⁶⁶ It was not, therefore, unreasonable for a jury to conclude that Konecrane was negligent in its failure to design the renovated crane in such a way as to protect Mesman against the kind of error that the crane operator made.¹⁶⁷ Accordingly, the court reversed the district judge’s entry of judgment for Konecranes.¹⁶⁸

162. *Id.*

163. *Id.* Alternative precautions (though perhaps less failsafe) might have included: (1) the addition of an “adjustable limit switch [that the operator] could have set to prevent the spreader beam from hitting the cab when it was underneath it”; (2) the “eliminat[ion of] the deceleration feature, so that pressing the down button while the spreader beam was rising would have brought the beam to an immediate stop”; (3) “reducing the period of deceleration from three seconds to one, which would have stopped the spreader beam within four inches after the down button was pressed rather than twelve”; and (4) the addition of “an additional automatic limit switch, one operative only when the unloading was taking place under the disused cab.” *Id.* at 850.

164. *See infra* Part IV.A.

165. *Mesman*, 409 F.3d at 851.

166. *Id.* at 851-52.

It is easy enough to push the wrong button in an emergency or to forget that pushing the down button isn’t as effective as pushing the emergency-stop button because of the deceleration feature. This argues for an automatic protective device, of which the cheapest would have been simply to remove the cab, made empty and useless by the removal from it of the crane controls.

Id. at 852.

167. *Id.*

168. *Id.* (citing *FMC Corp. v. Brown*, 551 N.E.2d 444, 445-46 (Ind. 1990); *Baker v. Heye-America*, 799 N.E.2d 1135, 1141-45 (Ind. Ct. App. 2003)). In addition and although it was error for the judge to enter judgment for Konecranes, the *Mesman* court did not conclude that the judge abused her discretion in ruling in the alternative that Konecranes was entitled to a new trial. *Id.* Indeed, the court noted that the “plaintiffs failed to put before the jury a clear picture of the cause of the accident and how it might have been prevented.” *Id.* In addition, the court pointed out that

2. *Warning Defect Theory*.—The IPLA contains a specific statutory provision covering the warning defect theory, which reads as follows:

A product is defective . . . if the seller fails to:

- (1) properly package or label the product to give reasonable warnings of danger about the product; or
- (2) give reasonably complete instructions on proper use of the product; when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or consumer.¹⁶⁹

In failure to warn cases, the “unreasonably dangerous” inquiry is essentially the same as the requirement that the defect be latent or hidden.¹⁷⁰

Indiana courts have been active in recent years in resolving cases espousing warning defect theories, including *First National Bank & Trust Corp. v. American Eurocopter Corp.*¹⁷¹ and *Birch v. Midwest Garage Door Systems*.¹⁷²

“Konecranes contributed to the jury’s confusion by presenting evidence that the renovated crane . . . complied with industry safety standards.” *Id.* According to the court, such compliance was “irrelevant” because “the danger arose from site-specific conditions that the industry standards don’t address.” *Id.* That the plaintiffs responded by criticizing the standards, in the court’s view, only “distracted the jury from those conditions—specifically the narrow clearance between boxcar and spreading beam in the vicinity of the abandoned but not removed cab -- on which resolution of the issue of negligence should have depended.” *Id.*

169. IND. CODE § 34-20-4-2 (2005).

170. *First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp.*, 378 F.3d 682, 690 n.5 (7th Cir. 2004). For a more detailed analysis of *American Eurocopter*, see Joseph R. Alberts, *Survey of Recent Developments in Indiana Product Liability Law*, 38 IND. L. REV. 1205, 1221-27 (2005).

171. *First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682 (7th Cir. 2004), *aff’g In re Inlow Accident Litig. (Inlow I)*, No. Ip 99-0830-C H/K, 2002 U.S. Dist. LEXIS 8318 (S.D. Ind. Apr. 16, 2002). In the *Inlow* cases, a helicopter rotor blade struck and killed the Conseco general counsel, Lawrence Inlow, as he passed in front of the helicopter after disembarking. *Id.* at 685. Because of the helicopter’s high-set rotor blades, the court determined as a matter of law that the deceleration-enhanced blade flap was a hidden danger of the helicopter and that the manufacturer had a duty to warn its customers of that danger. *Id.* at 688. The court ultimately held, however, that the manufacturer satisfied its duty to warn Conseco and Inlow as a matter of law in light of the sophisticated intermediary doctrine. *Id.* at 692-93.

172. 790 N.E.2d 504 (Ind. Ct. App. 2003). In *Birch*, a young girl sustained serious injuries when the door of the garage closed on her. *Id.* at 508. The court concluded that the garage door system at issue was not defective and that a change in an applicable federal safety regulation, in and of itself, does not make a product defective. *Id.* at 518. The court concluded that there was no duty to warn plaintiffs about changes in federal safety regulations because the system manual the plaintiffs received included numerous warnings regarding the type of system installed and that no additional information about garage door openers would have added to the plaintiffs’ understanding of the characteristics of the product. *Id.* at 518-19. For a more detailed analysis of *Birch*, see Alberts & Bria, *supra* note 26, at 1262-65.

See also *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893 (N.D. Ind. 2002) (rejecting plaintiff’s argument that a saw should have had warning labels making it more difficult for the saw guard to

During the 2005 survey period, Judge Hamilton decided the case of *Conley v. Lift-All Co.*,¹⁷³ another interesting case alleging inadequate product warnings. In *Conley*, the plaintiff was injured when a nylon sling suspending a 7000-pound bundled load of angle iron broke, causing the angle iron to fall on him.¹⁷⁴ Lift-All Co. manufactured the sling, which Conley's employer used to unload trucks.¹⁷⁵ The parties agreed that the sling broke because the edges of the angle iron cut into it.¹⁷⁶

In his suit against Lift-All, Conley ultimately pursued only a failure to warn theory, contending that "Lift-All failed to provide adequate warnings that the edges of a load that are not sharp could still cut the sling and cause it to drop its load if the sling is not protected by padding."¹⁷⁷ Judge Hamilton denied Lift-All's motion for summary judgment, determining that fact issues existed concerning: (1) "whether Lift-All had a duty to warn about the danger that dull or rounded edges could cut the sling"; (2) "whether Lift-All provided adequate warnings"; and (3) "whether the alleged failure to give adequate warning was a proximate cause of Conley's injuries."¹⁷⁸

Judge Hamilton's decision first addressed whether there is a duty to warn in the first place, acknowledging that there is "no actionable failure to warn without a duty to warn"¹⁷⁹ and that "there is no duty to warn of known or obvious hazards."¹⁸⁰ The court went on to write that "[t]he concept that there is no duty to warn of known or obvious risks has been described as the 'open and obvious' rule in the context of negligence actions."¹⁸¹ Consistent with his analysis in the *Bourne* case, Judge Hamilton rejected the idea that the concept of "open and obvious" is no longer applicable because the rule is no longer a stand-alone

be left in a position where it appeared installed when in fact it was not; the scope of the duty to warn is determined by the foreseeable users of the product and there was no evidence that the circumstances of plaintiff's injuries were foreseeable such that defendants had a duty to warn against those circumstances); *McClain v. Chem-Lube Corp.*, 759 N.E.2d 1096 (Ind. Ct. App. 2001) (holding that the trial court should have addressed whether the risks associated with use of a product were unknown or unforeseeable and whether the defendants had a duty to warn of the dangers inherent in the use of the product, because designated evidence showed that both defendants knew that the product at issue was to be used in conjunction with high temperatures that occurred as a result of the hot welding process). For a more detailed analysis of *Burt* and *McClain*, see Alberts & Boyers, *supra* note 35, at 1182-85.

173. No. 1:03-cv-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468 (S.D. Ind. July 25, 2005).

174. *Id.* at *1.

175. *Id.*

176. *Id.* at *1, *5.

177. *Id.* at *2.

178. *Id.*

179. *Id.* at *14 (citing *Am. Optical Co. v. Weidenhamer*, 457 N.E.2d 181, 187 (Ind. 1983)).

180. *Id.* at *14-15 (citing *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 655 (7th Cir. 1998); *Am. Optical*, 457 N.E.2d at 188).

181. *Id.* at *15 (citing *Bemis Co. v. Rubush*, 427 N.E.2d 1058, 1061 (Ind. 1981); *Welch v. Scripto-Tokai Corp.*, 651 N.E.2d 810, 815 (Ind. Ct. App. 1995)).

defense.¹⁸² Rather, as Judge Hamilton recognized, the existence of an “open and obvious” risk, in effect, renders the product not “unreasonably dangerous” as a matter of law, obviating the need for a warning.¹⁸³

Synthetic web slings are commonly used for rigging loads, and Federal Occupational Safety and Health Administration (“OSHA”) regulations govern their use.¹⁸⁴ The American Society of Mechanical Engineers (“ASME”) also publishes standards applicable to the use of slings.¹⁸⁵ Lift-All argued that “it owed no duty to warn Conley of the hazard that a lifted load could cut an unprotected sling because this hazard was ‘open and obvious’ to the intended community of users.”¹⁸⁶

According to Judge Hamilton, that question simply could not be resolved as a matter of law on the record before the court.¹⁸⁷ The record included Conley’s subjective belief that angle iron with rounded or dull edges would not cut the sling, which was based both upon his experience and his observation of others using slings without padding to unload angle iron.¹⁸⁸ In addition, “the OSHA regulations and ASME standards address the hazard of cutting an unprotected sling with only sharp edges.”¹⁸⁹ As the court explained, “[i]f a reasonable jury could infer from the facts that the hazard posed by a load of angle iron is hidden from the reasonable sling operator, a jury must decide whether Lift-All had a duty to warn of the danger.”¹⁹⁰

182. *Id.* at *15-16.

183. *Id.* On this point, Judge Hamilton wrote that “the obviousness of a danger [is] relevant in determining whether a product was sold in an unreasonably dangerous and defective condition, and in evaluating the affirmative defense of incurred risk.” *Id.* at *15-16 (citing *Koske v. Townsend Eng’g Co.*, 551 N.E.2d 437, 440-41 (Ind. 1990)). Moreover, “[w]hether a hazard is open and obvious and whether the product is unreasonably dangerous are essentially two ways of asking the same question.” *Id.* at *17 n.2 (citing *First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 690 n.5 (7th Cir. 2004)); *see also Inlow II*, 378 F.3d at 690 n.5 (“Under Indiana law, there is a duty to warn reasonably foreseeable users of all latent dangers inherent in the product’s use. . . . In failure to warn cases, the ‘unreasonably dangerous’ inquiry is not a separate inquiry from whether the defect is latent or hidden.”).

184. *Conley*, 2005 U.S. Dist. LEXIS 15468, at *6.

185. *Id.* at *8.

186. *Id.* at *16-17.

187. *Id.* at *17.

188. *Id.* at *17-18. During his work history, “Conley witnessed or was involved in unloading angle iron with a Lift-All sling on hundreds of occasions.” *Id.* at *11. He said that he never saw “a pad or other protection placed between the angle iron and the Lift-All sling, and unpadded slings had been used . . . for years without problems.” *Id.* at *11-12. Conley also testified that he “was trained in how to unload angle iron using the Lift-All sling,” but “was not told and was not aware that such a pad or protection was necessary.” *Id.* at *12. “On the day of the accident, . . . Conley personally inspected the sling that was used and saw no cuts, damage, or red core yarns.” *Id.* at *11.

189. *Id.* at *18.

190. *Id.* (citing *Cole v. Lantis Corp.*, 714 N.E.2d 194, 199 (Ind. Ct. App. 1999)). Judge

Lift-All submitted opinion testimony that “the general hazard presented by lifting a load with a synthetic sling, and the specific hazard of cutting the sling with a load of one quarter inch thick angle iron, would have been obvious to a reasonable sling operator ‘properly trained’ in using the sling.”¹⁹¹ According to the court, however, such testimony “begs the question of whether sling operators such as Conley are in fact properly trained in OSHA regulations and ASME standards, and whether a manufacturer like Lift-All may assume that they will be properly trained.”¹⁹² The court continued:

Lift-All presents no evidence that sling operators typically are in fact “properly trained.” . . . Without evidence that Conley received proper training, [Lift-All’s expert’s] opinion that the hazard of lifting angle iron with an unpadded sling would have been known or obvious to a *properly trained* sling operator does not prove beyond reasonable dispute that the risk that rounded or dull edges would cut the sling would have been known or obvious to an ordinary user or consumer.¹⁹³

Citing *Anderson v. P.A. Radocy & Sons, Inc.*,¹⁹⁴ among other cases, Judge Hamilton also noted that “[a] duty to warn may . . . exist even if end users of a product know about a danger but believe that the product can still be used safely.”¹⁹⁵ Conley, however, testified that he never saw anyone use protection between a load of angle iron and the Lift-All sling.¹⁹⁶

Accordingly, the court concluded that “Conley’s evidence raises a genuine issue of fact as to whether a reasonable sling operator would have recognized that a load of angle iron could cut an unpadded Lift-All sling. Whether Lift-All had a duty to warn Conley of this hazard cannot be decided as a matter of law.”¹⁹⁷

Hamilton distinguished the fact situation before him in *Conley* from the one presented by *In re Inlow Accident Litigation (Inlow I)*, 2002 U.S. Dist. LEXIS 8318 (S.D. Ind. Apr. 16, 2002), *aff’d sub nom.* First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (*Inlow II*), 378 F.3d 682 (7th Cir. 2004). In *Inlow I*, he “found that the specific risk of blade ‘flap’ posed by decelerating helicopter rotor blades would have been obvious to a trained helicopter pilot but not to an untrained passenger.” *Conley*, 2005 U.S. Dist. LEXIS 15468, at 22 (citing *Inlow I*, 2002 U.S. Dist. LEXIS 8318, at *16; *Inlow II*, 378 F.3d at 691). The *Inlow II* court held that although the dangers presented by moving rotor blades on some helicopters may be open and obvious, the danger posed by this particular helicopter’s decelerating blades was not obvious to passengers. *Inlow II*, 378 F.3d at 691. Whereas “[t]he helicopter manufacturer in *Inlow I* came forward with evidence showing that all the helicopter pilots were in fact aware of the specific risk posed by decelerating rotor blades,” Lift-All failed to “come forward with comparable evidence of knowledge.” *Conley*, 2005 U.S. Dist. LEXIS 15468, at *22-23.

191. *Conley*, 2005 U.S. Dist. LEXIS 15468, at *19-20.

192. *Id.* at *21.

193. *Id.*

194. 67 F.3d 619, 621-22 (7th Cir. 1995).

195. *Conley*, 2005 U.S. Dist. LEXIS 15468, at *24.

196. *Id.* at *11.

197. *Id.* at *25.

Having found a duty to warn to exist by virtue of a factual dispute about whether the product was “unreasonably dangerous,” Judge Hamilton next addressed whether the warning Lift-All provided was adequate as a matter of law. The sling at issue included the following warning on a tag sewn to it, which Conley admitted seeing:

! WARNING

**FOLLOW THIS WARNING OR PERSONAL INJURY MAY RESULT
INSPECT THE SLING FOR DAMAGE BEFORE EACH USE DO NOT
CUT, OVERLOAD OR EXPOSE TO TEMPERATURE ABOVE 200
[degrees] F**

DISCARD WHEN RED CORE YARNS APPEAR.¹⁹⁸

In addition, Lift-All slings like the one that Conley used were packaged with an information and warning sheet that stated in part:

! WARNING

**FAILURE TO READ, UNDERSTAND AND FOLLOW THE USE
AND INSPECTION INSTRUCTIONS FURNISHED WITH EACH
SLING MAY RESULT IN SEVERE PERSONAL INJURY OR
DEATH.**

**! WARNING WEB SLINGS CAN BE CUT BY CONTACT WITH
SHARP OR UNPROTECTED LOAD EDGES. PROPER PADDING
MUST BE USED TO PROTECT THE SLINGS.**

Web slings shall always be protected from being cut or damaged by corners, edges, protrusions, or abrasive surfaces. See Wear Pad section of Lift-All Catalog.¹⁹⁹

Several of the operating and inspection standards set forth by OSHA and ASME were also reiterated on the information and warning sheet.²⁰⁰

Conley testified that he never saw the sling involved until it was unpackaged and that he never saw a Lift-All catalog or any written material or warnings other than the warning sewn on the sling.²⁰¹ Lift-All countered that it is impossible to provide definitive warnings on the sling itself because of the wide array of “rigging techniques, . . . load shapes, compositions, and weights.”²⁰² Lift-All also pointed out that “presenting information and warnings through separate documentation . . . is a method used throughout the industry.”²⁰³

According to Judge Hamilton, “a reasonable jury could infer from Conley’s testimony that [his employer] did not make available to sling operators the documents that Lift-All packed with its slings.”²⁰⁴ Citing the venerable case *The*

198. *Id.* at *9.

199. *Id.* at *10.

200. *Id.*

201. *Id.* at *6, *9-10.

202. *Id.* at *27.

203. *Id.* at *27-28.

204. *Id.* at *28.

T.J. Hooper,²⁰⁵ Judge Hamilton pointed out that the industry's widespread presentation of warnings on separate packaging documentation "does not always control whether the method is reasonable."²⁰⁶ Accordingly, the court held that there was "a genuine issue of fact as to whether Lift-All could reasonably rely on buyers to pass along the warnings in the packaging."²⁰⁷

The *Conley* decision also holds that it was a question for the jury whether Lift-All adequately provided warnings to the "sophisticated intermediary," Conley's employer.²⁰⁸ "Under this doctrine, the duty to warn end users is satisfied when the product is sold to a 'sophisticated intermediary' whom the manufacturer has adequately warned."²⁰⁹ The doctrine only applies if the intermediary has "knowledge or sophistication equal to that of the manufacturer, and the manufacturer must be able to reasonably rely on the intermediary to warn the ultimate users."²¹⁰

In *Conley*, the evidence showed that Conley's employer consistently used unprotected slings to lift the angle iron without any accidents, even though the detailed warnings given in the packaging by Lift-All provided that slings could be cut by sharp or unprotected load edges. Judge Hamilton ruled that "[t]he evidence stops short of showing as a matter of law that [Conley's employer] had knowledge or sophistication equal to that of [Lift-All], let alone that [Lift-All] could reasonably rely on [Conley's employer] to pass the warnings along to the end users who would be in the danger zone."²¹¹ As such, "[a] reasonable jury could infer from Conley's testimony that [his employer did] not train its sling operators . . . to use padding when lifting angle iron or generally to be aware of the various types of edges that may cut an unprotected sling."²¹²

205. 60 F.2d 737, 740 (2d Cir. 1932) (Hand, J.) (finding that an entire industry may be negligent, therefore industry custom is only evidence of what is reasonable).

206. *Conley*, 2005 U.S. Dist. LEXIS 15468, at *28-29.

207. *Id.* at *29.

208. *Id.* at *33-34.

209. *Id.* at *29 (citing *First Nat'l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 691 (7th Cir. 2004); *Taylor v. Monsanto Co.*, 150 F.3d 806, 808-09 (7th Cir. 1998)).

210. *Id.* at *30 (citing *Inlow II*, 378 F.3d at 691; *Taylor*, 150 F.3d at 808).

211. *Id.* at *31-32.

212. *Id.* at *34. The final issue addressed by the court in *Conley* was whether Lift-All's alleged failure to adequately warn proximately caused Conley's injuries. *Id.* at *35. According to Judge Hamilton, "the focus is on the effect of giving a warning on the actual circumstances surrounding the accident" and "[t]he question is whether the plaintiff's injury was a natural and probable consequence of the failure to warn about the dangers associated with the product." *Id.* at *35 (internal quotations marks omitted) (quoting *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 164 (Ind. Ct. App. 1997)). The plaintiff may need to "show that an adequate warning would have altered the conduct which led to the injury." *Id.* (internal quotation marks omitted) (quoting *Downs*, 685 N.E.2d at 164).

Conley presented two alternative warnings to the court that he believed would have adequately warned of the danger that dull or rounded edges could also cut the sling, and that padding or protection should be used with any type of edge. *Id.* at *36. "An expert is normally required in

Practitioners should take note of Judge Hamilton's analysis in *Bourne* and in *Conley*. Though the legal methodology is applied in a perfectly consistent fashion, the ultimate conclusions differed. In *Bourne*, the issues were resolved as a matter of law because the undisputed facts presented led to only one reasonable conclusion. According to the court, the same simply did not hold true in *Conley*.

E. "... regardless of the substantive legal theory. . ."

Indiana Code section 34-20-1-1 provides that the IPLA "governs all actions that are: (1) brought by a user or consumer; (2) against a manufacturer or seller; and (3) for physical harm caused by a product; *regardless of the substantive legal theory or theories upon which the action is brought*."²¹³ Accordingly, theories of liability based upon breach of warranty, breach of contract, and common law negligence against entities that are outside of the IPLA's statutory definitions are not governed by the IPLA.²¹⁴ At the same time, however, Indiana Code section 34-20-1-2 provides that the "[IPLA] shall not be construed to limit any other action from being brought against a seller of a product."²¹⁵ That language, when compared with the "regardless of the legal theory upon which the action is brought"²¹⁶ language found in Indiana Code section 34-20-1-1 raises an interesting question: whether alternative claims against product sellers or suppliers that fall outside the reach of the IPLA are still viable when the "physical harm" suffered is the very type of harm the IPLA otherwise would cover.²¹⁷

design defect cases," but by court order, Conley had been precluded from presenting an expert at trial. *Id.* at *38. Judge Hamilton wrote that "Indiana law allows a plaintiff to prove in a proper case that a warning is inadequate without expert testimony on the subject[,] and "[e]xpert testimony is required to sustain the plaintiff's burden of proof on the question of the existence of a defect only where matters are beyond the common understanding of a lay juror." *Id.* at *41 (citations omitted). As with the other issues in *Conley*, Judge Hamilton held that "whether the alleged failure to warn was a proximate cause of Conley's injuries presents a disputed issue of fact." *Id.* at *42.

213. IND. CODE § 34-20-1-1 (2005) (emphasis added).

214. *E.g.*, N.H. Ins. Co. v. Farmer Boy AG, Inc., No. IP 98-0031-C-T/G, 2000 U.S. Dist. LEXIS 19502, at *10-11 (S.D. Ind. Dec. 19, 2000) (holding that a claim alleging "breach of implied warranty in tort is a theory of strict liability in tort and, therefore, has been superceded by the theory of strict liability," and, thus, plaintiff could proceed on a warranty claim so long as it was limited to a breach of contract theory).

215. IND. CODE § 34-20-1-2 (2005).

216. *Id.* § 34-20-1-1.

217. As quoted above, Indiana Code section 34-20-1-2 provides that the IPLA "shall not be construed to limit any other action from being brought against a seller of a product." *Id.* § 34-20-1-2. Both the placement of that provision and the words chosen are important. Having specifically provided in Indiana Code section 34-20-1-1 that the IPLA governs *all* actions against a seller or a manufacturer for physical harm caused by a product regardless of the substantive theory or theories upon which the action is brought, it would seem to follow that the only "other action" to which the

In recent years, state and federal courts in cases such as *Kennedy v. Guess, Inc.*,²¹⁸ *Coffman v. PSI Energy, Inc.*,²¹⁹ *Ritchie v. Glidden Co.*,²²⁰ and *Goines v. Federal Express Corp.*²²¹ have allowed claimants to pursue common law or non-IPLA statutory actions against manufacturers and sellers for the very same “physical harm” the IPLA covers. Three cases decided during the 2005 survey period appear to continue that trend.

In *Gunkel v. Renovations, Inc.*,²²² the Indiana Supreme Court held that under the “economic loss” doctrine, “physical injuries and damages to other property are recoverable in tort, but damages to the defective product itself are not.”²²³ The question then becomes whether the “other property” was acquired by the plaintiff separately or “as a component of the defective product.”²²⁴ The Gunkels contracted with Renovations, Inc. (“Renovations”) to build the Gunkels’ residence. Six months later, the Gunkels contracted with J & N Stone, Inc. (“J & N”) to install stone and masonry to the exterior of the residence. After the façade was installed, water entered through gaps in the façade. The Gunkels claimed that because of the moisture, “walls, ceilings, floors, drywall, carpet, and carpet padding were damaged.”²²⁵

The Gunkels sued Renovations for breach of contract and fraud, and later added J & N as a defendant under claims of negligence and breach of contract. The breach of contract claim against J & N was dismissed on partial summary judgment. The trial court also granted summary judgment on the negligence claim against J & N because the Gunkels’ negligence claim sought purely economic damages. The Court of Appeals agreed and held that because the Gunkels sought only economic losses, they had no tort claim.²²⁶ The Supreme Court disagreed.²²⁷

The Supreme Court found that

Indiana law under the [IPLA] and under general negligence law is that damage from a defective product or service may be recoverable under a

General Assembly later refers are those alleging some type of non-physical (i.e., commercial) harm. Such harm may be redressed as a matter of contract or warranty in a separate action not intended to be affected by the IPLA’s coverage of “physical harm.”

218. 806 N.E.2d 776 (Ind.), *reh’g denied* (Ind. 2004). For a detailed analysis of *Kennedy*, see Alberts, *supra* note 170, at 1210-14, 1241-42.

219. 815 N.E.2d 522 (Ind. Ct. App.), *reh’g denied* (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 745 (Ind. 2005).

220. 242 F.3d 713 (7th Cir. 2001).

221. No. 99-cv-4307-JPG, 2002 U.S. Dist. LEXIS 5070 (S.D. Ill. Jan. 8, 2002) (applying Indiana law).

222. 822 N.E.2d 150 (Ind.), *reh’g denied* (Ind. 2005).

223. *Id.* at 151.

224. *Id.*

225. *Id.*

226. *Id.* at 151-52.

227. *Id.* at 156-57.

tort theory if the defect causes personal injury or damage to other property, but contract law governs damage to the product or service itself and purely economic loss arising from the failure of the product or service to perform as expected.²²⁸

Without discussing why this case was not analyzed under the IPLA, the *Gunkel* court continued with an analysis under the economic loss doctrine and interpreted the definition of “other property.”

The *Gunkel* court found that “property acquired separately from the defective good or service is ‘other property,’ whether or not it is, or is intended to be, incorporated into the same physical object.”²²⁹ Therefore, the court concluded, the economic loss rule precluded recovery by the Gunkels for the damage to the façade, “but tort recovery for damage to the home, and its parts, caused by the allegedly negligent installation of the façade is not limited by the economic loss rule.”²³⁰

Shortly after releasing its opinion in *Gunkel*, the Indiana Supreme Court decided *Hyundai Motor America, Inc. v. Goodin*,²³¹ another example of a claimant utilizing a cause of action outside of the IPLA in a product liability case. In *Goodin*, the plaintiff sued Hyundai under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act²³² for breach of express and implied warranty, as well as revocation of acceptance, based upon problems she had with a car purchased from a dealer.²³³ After a two-day trial, a jury found in favor of Hyundai on the breach of express warranty claim, “but found in favor of Goodin on her claim for breach of implied warranty of merchantability,” assessing \$3000 in damages and \$19,237.50 in attorneys’ fees “pursuant to the fee shifting provisions of the Magnuson-Moss Warranty Act.”²³⁴

Hyundai then orally moved to set aside the verdict because Goodin did not have vertical privity with Hyundai. The trial court initially denied the motion, but the next day granted the motion concluding that lack of vertical privity precluded Goodin’s claim for breach of implied warranty. The trial court then granted Goodin’s motion to reinstate the verdict, determining that Hyundai was estopped from asserting lack of privity.²³⁵ The court of appeals agreed with Hyundai, holding that it was not estopped, privity was an element of Goodin’s claim, and privity was lacking.²³⁶

The Indiana Supreme Court accepted transfer and addressed the issue of privity in the context an alleged breach of implied warranty of merchantability.

228. *Id.* at 153.

229. *Id.* at 155.

230. *Id.* at 156-57.

231. 822 N.E.2d 947 (Ind. 2005).

232. 15 U.S. §§ 1301-12 (2000).

233. *Goodin*, 822 N.E.2d at 950.

234. *Id.*

235. *Id.* at 950-51.

236. *Id.* at 951.

Much of the discussion centered around the Uniform Commercial Code (“UCC”). The *Goodin* court mentioned the IPLA, however, in support of its conclusion, writing that the IPLA “does not require a personal injury plaintiff to prove vertical privity in order to assert a products liability claim against the manufacturer.”²³⁷ The *Goodin* court also wrote that “elimination of [the] privity requirement gives consumers . . . the value of their expected bargain, but will rarely do more than duplicate the [IPLA] as to other consequential damages.”²³⁸ And, if plaintiffs are able to recover additional damages under the UCC based upon the elimination of the privity requirement, “Indiana law would award the same damages under the [IPLA] as personal injury or damage to ‘other property’ from a ‘defective’ product.”²³⁹

Each of the foregoing cases allowed claimants to pursue common law or non-IPLA statutory claims outside the IPLA even when their allegations appeared to involve the type of “physical harm” the IPLA covers. And, in *Kennedy, Coffman, Ritchie*, and *Goines*, such was true even when the defendants were not “manufacturers” or “sellers” under the IPLA.²⁴⁰ Clearly, there are important policy considerations involved when courts decide to impose common law and non-IPLA liability in cases involving “physical harm” as defined by the IPLA, particularly in cases against entities that do not otherwise qualify as “manufacturers” or “sellers” under the IPLA.

Gunkel, Goodin, Kennedy, Coffman, Ritchie, and *Goines* make it readily apparent that Indiana federal and appellate courts seem to have no difficulty allowing alternative statutory and common law claims against product sellers, suppliers, and manufacturers that fall outside the reach of the IPLA even when the “physical harm” suffered is the very type of harm the IPLA otherwise would cover. Legislative action likely is the only way to reverse that trend, if indeed the Indiana General Assembly intended something different.

II. STATUTES OF REPOSE

Product liability cases involving asbestos products are unique in several ways, including the manner by which the Indiana General Assembly chose to handle the repose period that applies to them. Indiana Code section 34-20-3-2(a) provides that a product liability action based upon either “property damage resulting from asbestos” or “personal injury, disability, disease, or death resulting from exposure to asbestos . . . must be commenced within two (2) years after the cause of action accrues.”²⁴¹ That rule applies, however, “only to product liability

237. *Id.* at 954 (citing IND. CODE §§ 34-20-2-1 to -4 (2004); *Lane v. Barringer*, 407 N.E.2d 1173, 1175 (Ind. Ct. App. 1980)).

238. *Id.* at 959.

239. *Id.* (citing *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150 (Ind.), *reh’g denied* (Ind. 2005)).

240. *See supra* notes 218-21 and accompanying text.

241. IND. CODE § 34-20-3-2(a) (2005). The statute further provides that an action accrues “on the date when the injured person knows that the person has an asbestos related disease or injury,” *id.* § 34-20-3-2(b), and that the “subsequent development of an additional asbestos related disease

actions against . . . persons who mined *and* sold commercial asbestos,” and to “funds that have, as a result of bankruptcy proceedings or to avoid bankruptcy proceedings, been created for the payment of asbestos related disease claims or asbestos related property damage claims.”²⁴²

In *AlliedSignal, Inc. v. Ott*,²⁴³ the Indiana Supreme Court held that Indiana Code section 34-20-3-1 bars claims against manufacturers that did not sell bulk asbestos fiber for asbestos-related injuries accruing more than ten years after the initial delivery.²⁴⁴ In doing so, the court concluded that the asbestos-specific “discovery rule” exception to the ten-year repose period²⁴⁵ does not apply to manufacturers that did not sell bulk asbestos fiber.²⁴⁶ The *Ott* court also held that application of the ten-year statute of repose does not violate “due process” guarantees provided by article I, section 23 of the Indiana Constitution.²⁴⁷ The court, however, left open, pending further factual findings whether the statute of repose violated article I, section 12 of the Indiana Constitution as applied.²⁴⁸

On the latter issue, the court determined that a cause of action “accrues” when “the disease has actually manifested itself.”²⁴⁹ The court then acknowledged that injury “does not occur upon mere exposure to (or inhalation of) asbestos fibers” but that “injury may well occur before the time that it is discovered.”²⁵⁰ As such, the court concluded that Indiana Code section 34-20-3-1 “might be unconstitutional as applied to the plaintiff if a reasonably experienced physician could have diagnosed Jerome Ott with an asbestos-related illness or disease within the ten-year statute of repose, yet Ott had no reason to know of the diagnosable condition until the ten-year period had expired.”²⁵¹ Because the record had not been developed to address that issue, the case was remanded to the trial court for further proceedings.²⁵²

Two follow-up cases, including the same *Ott* case noted above, made their way to the Indiana Court of Appeals during the current survey period. First, in *Jurich v. John Crane, Inc.*,²⁵³ plaintiffs claimed that they contracted mesothelioma (a type of lung cancer) as a result of workplace exposure to

or injury is a new injury and is a separate cause of action.” *Id.* § 34-20-3-2(a).

242. *Id.* § 34-20-3-2(d) (emphasis added).

243. 785 N.E.2d 1068 (Ind. 2003), *appeal after remand*, 827 N.E.2d 1194 (Ind. Ct. App. 2005).

244. *Id.* at 1072-73. For a detailed analysis of *Ott* and a brief overview of the cases and issues that preceded it, see Alberts & Bria, *supra* note 26, at 1276-82.

245. IND. CODE § 34-20-3-2 (2005) (formerly IND. CODE § 33-1-1.5-5.5).

246. *Ott*, 785 N.E.2d at 1073.

247. *Id.* at 1075-77.

248. *Id.* at 1077.

249. *Id.* at 1075.

250. *Id.*

251. *Id.*

252. *Id.*

253. 824 N.E.2d 777 (Ind. Ct. App.), *trans. denied sub nom.* *Jurich v. Anchor Packing Co.*, 841 N.E.2d 179 (Ind. 2005).

asbestos.²⁵⁴ The defendants sought summary judgment based upon the statute of repose.²⁵⁵ Plaintiffs countered with testimony from opinion witnesses that cellular changes leading to the development of mesothelioma could have been detected within the statute of repose period with certain invasive exams and tests.²⁵⁶ The trial court granted the defendants' motions for summary judgment, concluding that the IPLA statute of repose was constitutional as applied to the plaintiffs.²⁵⁷ Plaintiffs appealed.

The *Jurich* court first acknowledged that evidence from opinion witnesses indicated that inhalation of asbestos by the plaintiffs probably caused immediate lung damage that eventually led to mesothelioma, but that such initial damage was not mesothelioma, and that a reasonably experienced physician would not have diagnosed either plaintiff with mesothelioma until after the repose period had expired.²⁵⁸ According to the court, although certain invasive tests could have been performed on the plaintiffs during the repose period, "it would have been highly dangerous, unethical, and medically inappropriate to perform" such invasive tests on persons with no symptoms whatsoever.²⁵⁹

Interpreting *Ott*, the *Jurich* court concluded that an "'asbestos-related illness or disease' that could have been diagnosed by a 'reasonably experienced physician'" meant a "disease that is a clinically-recognized symptomatic condition, or one that could have been detected by a competent physician conducting a routine examination of the patient."²⁶⁰ Such a definition excludes "asymptomatic conditions that merely represent the early stages of a potential disease or condition that could only be detected by a physician utilizing extreme and medically unsound or unethical measures."²⁶¹ Accordingly, based upon the facts as applied to the *Ott* requirements, the plaintiffs "failed to demonstrate that the [I]PLA statute of repose is unconstitutional as applied to them."²⁶²

A separate panel of the court of appeals reached the result in *Ott v. AlliedSignal, Inc.*,²⁶³ the appeal arising out of the same original lawsuit that reached the Indiana Supreme Court on the issues noted above. After the Indiana Supreme Court remanded the case to the trial court, the trial court granted summary judgment to several defendants based upon the statute of repose.²⁶⁴ Plaintiffs appealed the grant of summary judgment to the Indiana Court of Appeals, challenging, among other things, that the statute of repose was

254. *Id.* at 778.

255. *Id.*

256. *Id.* at 779.

257. *Id.* at 778.

258. *Id.* at 783.

259. *Id.*

260. *Id.* (quoting *AlliedSignal, Inc. v. Ott*, 785 N.E.2d 1068, 1075 (Ind. 2003)).

261. *Id.*

262. *Id.* at 784.

263. 827 N.E.2d 1144 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 187 (Ind. 2005).

264. *Id.* at 1147.

unconstitutional as it was applied to the facts of the case.²⁶⁵

Relying heavily on the *Jurich* decision with regard to its analysis of the article I, section 12 issue, the court of appeals affirmed.²⁶⁶ The court agreed with *Jurich*'s "general framework," determining that a manifested asbestos-related illness or disease that a reasonably experienced physician could have diagnosed, is indeed, a "disease that is a clinically-recognized symptomatic condition, or one that could have been detected by a competent physician conducting a routine examination of the patient."²⁶⁷ According to the court, such a test is appropriate "because it requires the plaintiff either to display symptoms or to present a condition that can be diagnosed without unusual or heroic measures."²⁶⁸ Ott did not have any clinically recognizable symptoms of lung cancer during the repose period, and his condition could only have been detected by "an invasive and dangerous procedure that would not have been clinically indicated in the absence of symptoms."²⁶⁹

The *Ott* court also rejected the notion that application of the statute of repose violates the Equal Privileges and Immunities Clause (article I, section 23) of the Indiana Constitution because it precludes claims that have longer latency periods caused by newer products but not shorter latency claims caused by identical older products.²⁷⁰ The court held that the statutory classification "survives scrutiny under article I, section 23 of the Indiana Constitution."²⁷¹

265. *Id.* at 1148. The trial court concluded that the statute of repose as applied to Ott did not violate article I, section 12 of the Indiana Constitution because even though the "process of the development of [Ott's] cancer likely began during the ten-year repose period[.]" there was no evidence that the disease manifested within the repose period. *Id.* at 1149. Furthermore, "the trial court found no evidence that a reasonably experienced physician could have diagnosed the illness within the repose period." *Id.*

266. *Id.* at 1149, 1152-53 (citing *Jurich v. John Crane, Inc.*, 824 N.E.2d 777 (Ind. Ct. App.), *trans denied sub nom.* *Jurich v. Anchor Packing Co.*, 841 N.E.2d 179 (Ind. 2005)). The court of appeals first determined that the trial court erroneously struck affidavits supporting Ott's motions. The affidavits were submitted by opinion witnesses who had never examined Ott or his medical records, and two of the affidavits were prepared for other cases. The panel believed that the affidavits should have been admitted because they explained the disease process applicable to all asbestos-related cancer victims, and were "therefore relevant in that it makes facts of consequence to the determination of the action more or less probable than it would be without the evidence." *Id.* at 1150 (citing IND. EVID. R. 401). Ultimately, however, the admission of the affidavits did not result in reversal.

267. *Id.* at 1153.

268. *Id.* at 1155.

269. *Id.*

270. *Id.* at 1159.

271. *Id.* at 1160.

III. EVIDENTIARY PRESUMPTION FOR COMPLIANCE WITH GOVERNMENT STANDARDS

The IPLA, by Indiana Code section 34-20-5-1, entitles a manufacturer or seller to a rebuttable presumption that the product causing the physical harm is not defective and that the product's manufacturer or seller is not negligent if, before the sale by the manufacturer, the product:

- (1) was in conformity with the generally recognized state of the art applicable to the safety of the product at the time the product was designed, manufactured, packaged, and labeled; or
- (2) complied with applicable codes, standards, regulations, or specifications established, adopted, promulgated, or approved by the United States or by Indiana, or by any agency of the United States or Indiana.²⁷²

Two cases decided during the survey period reached opposite conclusions with respect to how the presumption should operate in an evidentiary context. Interestingly enough, both cases involve motor vehicle accidents. In the first case, *Schultz v. Ford Motor Co.*,²⁷³ plaintiff Schultz was involved in a one-car accident in his Ford Explorer. During the accident, the vehicle slid sideways off the roadway, rolled over, hitting the ground on the driver's side roof, and then landed on its wheels.²⁷⁴ The driver's side roof collapsed one foot when the vehicle hit the ground.²⁷⁵ Schultz suffered a cervical cord injury.²⁷⁶ Schultz sued Ford, alleging negligence and defective roof design.²⁷⁷

Schultz's trial brief objected to the use of any jury instruction derived from the IPLA governmental compliance presumption or the Indiana Pattern Jury Instruction 7.05(D), which was patterned after the IPLA's statutory presumption.²⁷⁸ Schultz again raised his objection to the jury instruction at trial.²⁷⁹ The trial court overruled the objection and read Ford's proffered jury instruction to the jury.²⁸⁰ After an eight week trial, the jury found in favor of Ford on all claims.²⁸¹

On appeal, Schultz argued that it was reversible error for the trial court to give Ford's instruction on the governmental compliance presumption because the

272. IND. CODE § 34-20-5-1 (2005).

273. 822 N.E.2d 645 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. granted*, 841 N.E.2d 182 (Ind. 2005).

274. *Id.* at 647.

275. *Id.*

276. *Id.*

277. *Id.* at 647-48.

278. *Id.* at 648.

279. *Id.*

280. *Id.*

281. *Id.* at 648.

statute has no evidentiary value.²⁸² Schultz asserted that the only purpose of the presumption is to require the plaintiff to rebut the presumption and, “once that burden is met, the presumption serves no further purpose and drops from the case.”²⁸³ Schultz also asserted that the IPLA governmental compliance presumption “creates a rebuttable *presumption*, which imposes a burden of production—not proof—and, hence, is an improper subject of jury instruction.”²⁸⁴ Ford replied “that the presumption of non-negligence under the IPLA is closer to a statutorily recognized inference and, as such, is appropriate for use as an instruction to the jury.”²⁸⁵

Finding the distinction between a presumption and inference to be key to the case holding, the *Schultz* court discussed the two terms. First, the court stated that “‘presumption’ is one of the slipperiest members of the family of legal terms.”²⁸⁶ Furthermore,

“A presumption is an assumption of fact resulting from a rule of law that requires the fact to be assumed from another proven fact or group of facts. Stated differently, a presumption is a declaration of public policy that if a litigant presents evidence of a specified set of facts, then an additional fact will be presumed to exist.”²⁸⁷

The *Schultz* court found the distinction between a presumption and inference to be “best understood by noting that ‘a presumption is a deduction that the law requires the trier of fact to make if it finds a certain set of facts.’”²⁸⁸ Therefore, the court concluded, “a presumption differs from an inference, which the trier may or may not make according to his own conclusions drawn from the facts adduced at trial. A presumption is mandatory, while an inference is permissive.”²⁸⁹

The *Schultz* court also cited Miller’s Indiana Evidence treatise in Indiana Practice for three differences between presumptions and inferences.²⁹⁰

First, presumptions are mandatory unless rebutted; the presumed fact must be taken as true in the absence of evidence to the contrary. Inferences are permissible, but never mandatory, when the evidence is being weighed; the trier of fact is not required to draw inferences.

Second, presumptions are not weighed in the sense evidence is weighed

282. *Id.* at 652.

283. *Id.* at 652.

284. *Id.* at 653.

285. *Id.*

286. *Id.* (citing JOHN W. STRONG, MCCORMICK ON EVIDENCE § 342 (5th ed. 1999)).

287. *Id.* (quoting 12 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE, INDIANA EVIDENCE § 301.101 (2d ed. 1995)).

288. *Id.* (quoting *In re Borom*, 562 N.E.2d 772, 775 (Ind. Ct. App. 1990)).

289. *Id.* (citing *Borom*, 562 N.E.2d at 775).

290. *Id.*

if contrary evidence is produced, although a presumption met by rebutting evidence may effectively become an inference under Rule 301. An inference remains in the case despite the presentation of contrary proof and may be weighed with all the other evidence.

Third, a presumption need not be based entirely upon logical probabilities; public policy, social convenience, safety or procedural convenience may lead to the creation of a presumption. An inference, however, must be logical. Inferences also must be based on evidence.²⁹¹

After its review of the distinctions between presumptions and inferences, the *Schultz* court concluded that the IPLA governmental compliance presumption “creates a mandatory presumption and not a permissive inference.”²⁹² The court stated that the IPLA “presumption is mandatory and, unless rebutted, allows the conclusion that the manufacturer was not negligent. The governmental compliance presumption does not arise logically, but instead is a legislative fiction created to address the public policy concerns that manufacturers do not get adequate credit for complying with governmental standards.”²⁹³

The court agreed with *Schultz*, and found that “the governmental compliance presumption helps Ford on a motion for summary judgment or a directed verdict, but an instruction explaining this presumption has no evidentiary value and no practical effect at trial.”²⁹⁴ Holding that it was reversible error for the trial court to read Ford’s proffered jury instruction on the governmental compliance statute, the *Schultz* court wrote, “[t]he rebuttable presumption of [the IPLA] is not evidence; instead, it should be used as guidance for the court and not as evidence for the jury.”²⁹⁵

In *Flis v. Kia Motors Corp.*,²⁹⁶ Judge Tinder reached a different conclusion, writing that “the Indiana Supreme Court would most likely disagree with the *Schultz* opinion regarding an instruction based upon Indiana Code section 34-20-5-1 and grant transfer in that case.”²⁹⁷ In *Flis*, the driver of a Kia sport utility vehicle was injured during a one-car accident in which her vehicle rolled over.²⁹⁸ As was the case in *Schultz*, Kia offered a jury instruction based upon the IPLA governmental compliance presumption and Indiana Pattern Jury Instruction 7.05(D).²⁹⁹ Flis objected to the use of the proffered instruction based upon the

291. *Id.* (footnotes omitted) (citing 12 MILLER, *supra* note 287, § 301.101).

292. *Id.* at 654.

293. *Id.*

294. *Id.* at 655.

295. *Id.*

296. No. 1:03-cv-1567-JDT-TAB, 2005 U.S. Dist. LEXIS 12911, at *1 (S.D. Ind. June 20, 2005).

297. *Id.* at *17.

298. *Id.* at *2.

299. *Id.*

Schultz decision.³⁰⁰ Judge Tinder overruled the plaintiff's objection.³⁰¹

After first recognizing that the court must "use its best judgment to apply the rules of law that the Supreme Court of Indiana would apply,"³⁰² Judge Tinder characterized the *Schultz* decision as one applying the "'bursting bubble' theory of presumptions, 'whereby the presumption bursts' [sic] and vanishes once evidence to dispute the existence of the presumed fact is produced.'"³⁰³ However, he went on to point out that Rule 301 of the Indiana Rules of Evidence modifies the traditional "bursting bubble" theory by providing in the second sentence of the rule that, "[a] presumption shall have continuing effect even though contrary evidence is received."³⁰⁴

Although he recognized that Indiana's evidentiary rules did not apply to the procedural conduct of a trial in federal court, Judge Tinder reviewed Indiana's Rule 301 in an effort to give effect to the presumption, which is an issue of substantive Indiana product liability law under the IPLA.³⁰⁵ As such, Judge Tinder had to consider how the Indiana Supreme Court likely would resolve the issue, ultimately determining that the Indiana Supreme Court would not follow *Schultz*.³⁰⁶

Perhaps aware of the conflict between *Flis* and *Schultz*, the Indiana Supreme Court granted transfer in *Schultz* in August 2005. Oral argument was held in November 2005.

IV. DEFENSES

A. *Use with Knowledge of Danger (Incurred Risk)*

Indiana Code section 34-20-6-3 provides that "[i]t is a defense to an action under [the IPLA] that the user or consumer bringing the action: (1) knew of the defect; (2) was aware of the danger in the product; and (3) nevertheless proceeded to make use of the product and was injured."³⁰⁷ Incurred risk is a defense that "involves a mental state of venturousness on the part of the actor and demands a subjective analysis into the actor's actual knowledge and voluntary acceptance of the risk."³⁰⁸ At least one Indiana court has held in the summary judgment context that application of the incurred risk defense requires

300. *Id.*

301. *Id.*

302. *Id.* at *10 (internal quotation marks omitted) (quoting *Dameron v. City of Scottsburg*, 36 F. Supp. 2d 821, 831 (S.D. Ind. 1998)).

303. *Id.* at *11 (quoting 12 MILLER, *supra* note 283, § 301.102).

304. *Id.* at *12-13 (internal quotation marks omitted) (quoting IND. R. EVID. 301).

305. *Id.* at *15-16.

306. *Id.* at *15-17.

307. IND. CODE § 34-20-6-3 (2005).

308. *Cole v. Lantis Corp.*, 714 N.E.2d 194, 200 (Ind. Ct. App. 1999); *Henderson v. Freightliner, LLC*, No. 1:02-cv-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832, at *11 (S.D. Ind. Mar. 24, 2005).

uncontradicted evidence from which the sole inference to be drawn is that the plaintiff had actual knowledge of the specific risk and understood and appreciated that risk.³⁰⁹

In this regard, we revisit the case of *Mesman v. Crane Pro Services, a Division of Konecrane, Inc.*,³¹⁰ which was discussed above in connection with design defect issues.³¹¹ There, plaintiff John Mesman suffered serious leg injuries when a load of steel sheets fell on him while a crane was unloading them from a boxcar.³¹² Before the accident, Konecranes, Inc. evaluated the design and operation of the crane and made several changes, “including substitut[ing] for the controls in the operator’s cab a hand-held remote-control device with which the operator would operate the crane from ground level.”³¹³ Konecranes also installed an emergency stop button alongside the “up” and “down” buttons on the remote device, which the operator could press if he or she “sensed an impending collision between the load and the cab.”³¹⁴ “Because the up and down controls had a deceleration feature to reduce wear and tear on the crane, the spreader beam would continue to rise for three seconds after the down button was pressed.”³¹⁵ In those three seconds, the beam would still travel about a foot until it stopped and began its reverse motion.³¹⁶

On the day of the accident, Mesman was standing in the boxcar as he “fastened a load of steel sheets to the scoops beneath the crane’s spreader beam.”³¹⁷ Standing on the floor of the plant about twenty feet away from the boxcar, the crane operator pressed the “up” button on the remote controller,

309. Indiana courts have decided some important incurred risk cases in the last few years. *E.g.*, *Smolk Materials Handling Co. v. Kerr*, 719 N.E.2d 396 (Ind. Ct. App. 1999) (finding no basis for the incurred risk defense under the facts of that case; plaintiff had no knowledge of the fact that the manufacturer had changed the design of the lift so as to eliminate pins that would have prevented rods from falling unexpectedly from the lift cups underneath the lift platform); *Hopper v. Carey*, 716 N.E.2d 566 (Ind. Ct. App. 1999) (finding that because the plaintiffs did not adequately specify the basis of their claim, it was unclear “whether the defect in the fire truck was open and obvious or whether warnings were placed on the truck informing the passengers of the specific risk from which the Hoppers’ injuries resulted” and the court was unable to determine the applicability of the incurred risk defense); *Cole*, 714 N.E.2d 194 (concluding that because plaintiff’s job necessarily entailed moving containers across a gap between aircraft and aircraft loading equipment and he apparently believed that he had to somehow find a way to work around the known danger posed by the gap, whether plaintiff voluntarily incurred the risk of falling through the gap is a question of fact for the jury’s resolution).

310. 409 F.3d 846 (7th Cir.), *reh’g and reh’g en banc denied* (7th Cir. 2005).

311. *See supra* Part I.D.

312. *Mesman*, 409 F.3d at 847.

313. *Id.* at 848.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

causing the beam and the load to rise.³¹⁸ The operator “saw that the spreader beam was going to hit the cab, but instead of pressing the emergency-stop button, . . . he [mistakenly] pressed the down button.”³¹⁹ “Because of the deceleration feature . . . and the narrow clearance between the cab and the rim of the boxcar, the beam continued to rise for three seconds,” hitting the cab and causing the load to fall on Mesman.³²⁰

As part of its defense to the design defect allegations, Konecranes argued that the crane operator “exposed Mesman to a danger that was open and obvious.”³²¹ “By pressing the down button, Konecranes argue[d], [the crane operator] exposed Mesman to a danger that was ‘open and obvious’ to [the crane operator].”³²² In this context, “the danger [was] that the rising spreader beam would not stop in time to avoid hitting the cab and dislodging the beam’s load unless the emergency-stop button was pushed.”³²³ “Konecranes argue[d] that it had no legal obligation to protect against such a danger.”³²⁴ Konecranes further contended that although the danger was not obvious to Mesman, it was obvious to the crane operator and the “appearance of danger” to the crane operator was “legally relevant to the apportionment of liability between the [crane operator’s] employer and Konecranes.”³²⁵

The *Mesman* court (Judge Posner writing) refused to apply the “open and obvious” concept to the facts presented, pointing out that the current version of the IPLA deliberately omitted the “open and obvious” rule as a stand-alone defense, replacing it instead with the “incurred risk” defense “that requires proof that the user . . . was actually ‘aware of the danger of the product.’”³²⁶ In the context of applying the “open and obvious” concept to the “incurred risk” defense, however, the *Mesman* court specifically recognized that an open and obvious risk “remains relevant to liability” because “[i]t is circumstantial evidence that the user of the product knew of the danger (and thus ‘incurred’ the risk)”³²⁷ and because it “bears on whether the risk was great enough to warrant protective measures beyond what the user himself would take.”³²⁸

Konecranes argued that the General Assembly eliminated the “open and obvious” defense only with respect to claims alleging manufacturing defects, and

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* at 850.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.* (quoting IND. CODE § 34-20-6-3 (2004)).

327. *Id.* (citing *Montgomery Ward & Co. v. Gregg*, 554 N.E.2d 1145, 1150-51 (Ind. Ct. App. 1990)).

328. *Id.* at 851 (citing *Lovell v. Marion Power Shovel Co.*, 909 F.2d 1088, 1090-91 (7th Cir. 1990); *Miller v. Todd*, 551 N.E.2d 1139, 1143 (Ind. 1990); *Welch v. Scripto-Tokai Corp.*, 651 N.E.2d 810, 815 (Ind. Ct. App. 1995); *Gregg*, 554 N.E.2d at 1150-51).

not with respect to claims alleging design defects.³²⁹ Stated differently, although Konecranes never specifically pleaded or argued the “incurred risk” defense per se, Konecranes, in effect, contended that “incurred risk” remains a complete defense even after the 1995 IPLA amendments.³³⁰ The *Mesman* court rejected that contention:

Suppose a machine is designed without a shield over its moving parts. It is obvious to the operator that if he sticks his hand into the machine while the machine is operating, the hand will be mangled. In the old days [before the 1995 amendments] that would have been a complete defense. But the new law recognizes that because of inadvertence or other human error, or because of debris or a slippery surface that might cause a worker to trip, or even because of a distracting noise or a sudden seizure, open and obvious hazards do on occasion result in accidents. If those accidents can be avoided by a design modification at very little cost, then even if the risk is slight, the modification may be cost-justified The analogy to the doctrine of last clear chance, which imposes a duty of care on a potential injurer even when the potential victim has carelessly or even recklessly exposed himself to danger, is apparent.³³¹

The *Mesman* court openly acknowledged that such a determination places it at odds with recent Indiana appellate decisions holding that a plaintiff whom is found to have incurred an open and obvious risk is barred from recovery under the IPLA.³³² These decisions conclude the “open and obvious nature of the danger . . . negate[s] a necessary element of the plaintiff’s prima facie case” (i.e., that the defect was hidden).³³³ In effect, such holdings render “incurred risk” a complete defense.

The Indiana Supreme Court’s decision in *Vaughn* not only addressed the terms “user” and “consumer,” it cleared up any lingering controversy about how courts and practitioners in Indiana should view the incurred risk defense in product liability cases. The *Vaughn* court plainly held that “[i]ncurred risk acts as a complete bar to liability with respect to negligence claims brought under the IPLA.”³³⁴

The *Vaughn* decision is consistent with several prior cases on that point, including *Baker v. Heye-America*,³³⁵ *Hopper v. Carey*,³³⁶ and *Cole v. Lantis*

329. *Id.* at 851.

330. *Id.* at 850-51.

331. *Id.* at 851 (internal citations omitted).

332. *Id.*

333. *Id.* (quoting *Cole v. Lantis*, 714 N.E.2d 194, 199 (Ind. Ct. App. 1999)). Actually, the *Mesman* court recognized only that its interpretation of the “incurred risk” defense is at odds with *Cole* and *Baker*. *Id.*

334. *Vaughn v. Daniels Co.*, 841 N.E.2d 1133, 1146 (Ind. 2006).

335. 799 N.E.2d 1135 (Ind. Ct. App. 2003).

336. 716 N.E.2d 566, 576 (Ind. Ct. App. 1999) (“[E]ven if a product is sold in a defective condition unreasonably dangerous, recovery *will be denied* an injured plaintiff who had actual

Corp.,³³⁷ and the court of appeals's decision in *Vaughn*.³³⁸ Those cases all previously determined that incurred risk remains a complete defense in Indiana.³³⁹

In addition to *Mesman, Henderson v. Freightliner, LLC*³⁴⁰ is another federal decision issued during the survey period that addressed the incurred risk defense. In that case, Ronald Henderson was a "diesel truck mechanic who was seriously injured when a component of the pressurized air suspension system" of a truck manufactured by Freightliner burst.³⁴¹ At the time of the accident, Henderson was working on the driver's side air spring, which consisted of a rubber air bag and a piston.³⁴² When replacing the air spring assembly, Freightliner's service manual instructs mechanics, among other things, to "[r]aise the vehicle frame and support it with safety stands," to disconnect the leveling valve, and to "exhaust all air from the air springs."³⁴³ Henderson was familiar with the warning and knew that he needed to take such steps before working on the suspension system.³⁴⁴ When he first rolled under the truck on his roller platform, however, he had not yet released the air in the air suspension system and it remained pressurized.³⁴⁵ The air spring assembly exploded while Henderson was beneath the truck.³⁴⁶

The parties disputed whether Henderson rolled under the truck merely to diagnose or inspect the air spring, or whether he had actually started to work on

knowledge and appreciation of the specific danger and voluntarily [incurred] the risk." (emphasis added) (internal quotation marks omitted)).

337. 714 N.E.2d 194, 199 (Ind. Ct. App. 1999).

338. 777 N.E.2d 1110 (Ind. Ct. App. 2002), *clarified on reh'g*, 782 N.E.2d 1062 (Ind. Ct. App. 2003), *vacated*, 841 N.E.2d 1133 (Ind.), *reh'g denied* (Ind. 2006).

339. In *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 745 (Ind. 2005), a panel of the Indiana Court of Appeals seemed to assume, as did *Mesman*, that the incurred risk defense is not a complete one because it embraces a discussion built around a comparative fault analysis, ultimately finding no liability because, as a matter of law, no reasonable juror could have concluded anything other than that Coffman's comparative fault in incurring the risk exceeded the total fault that could be assessed to the alleged tortfeasors. The court in *Coffman* noted that "incurred risk bars a product strict liability claim when the evidence is undisputed and reasonable minds could draw" only one inference. 815 N.E.2d at 528 (citing *Smock Materials Handling Co. v. Kerr*, 719 N.E.2d 396, 402 (Ind. Ct. App. 1999)). "While the allocation of each party's proportionate fault is generally a question for the trier of fact, such is not the case when there is no dispute in the evidence and the fact finder could reach only one conclusion." *Id.* at 528.

340. No. 1:02-cv-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832 (S.D. Ind. Mar. 24, 2005).

341. *Id.* at *1.

342. *Id.* at *4.

343. *Id.* at *5.

344. *Id.*

345. *Id.*

346. *Id.* at *5-6.

it.³⁴⁷ Although Henderson did not recall anything that occurred after he rolled under the truck, “a co-worker inspected the scene” after the accident “and found tools under the truck, including an impact gun, some sockets, and a wrench.”³⁴⁸ The first mechanic to work on the truck after Henderson’s injury, Timothy Couch, testified that he found a deep-well socket that belonged to Henderson wedged between the truck’s frame and the axle housing.³⁴⁹ Couch testified that mechanics put sockets in that location to prevent the frame from lowering onto the axle housing when the air is released from the suspension system.”³⁵⁰

Removing an air spring assembly requires a mechanic to loosen U-bolts that hold the truck’s leaf springs in place.³⁵¹ The parties also disputed whether the U-bolts securing the leaf spring were tight when Couch began to remove the failed air spring assembly, or whether Henderson had already loosened them.³⁵²

Henderson brought claims against Freightliner as well as the manufacturer of the allegedly defective air spring component of the truck’s suspension system and the allegedly defective leaf spring that was part of the suspension.³⁵³ Each of the defendants moved for summary judgment, arguing, among other things, that Henderson incurred the risk of harm by working on the truck’s suspension system without first bleeding the air pressure from the system.³⁵⁴

Judge Hamilton began his analysis by recognizing that the defendants had to “present sufficient evidence to convince a reasonable jury that Henderson had actual knowledge of the specific risk that he faced” in order for the incurred risk defense to apply.³⁵⁵ To apply the defense to foreclose claims as a matter of law in the context of a summary judgment motion, Judge Hamilton wrote that the defendants would have to show that any reasonable jury would be required to find that Henderson had such knowledge.³⁵⁶

Judge Hamilton concluded that the defendants were not entitled to judgment as a matter of law with respect to the incurred risk defense because record evidence, in his view, “would easily allow a jury to find that Henderson had not begun working on a still pressurized air suspension system when the piston exploded.”³⁵⁷ According to the court, evidence existed that would allow a jury to conclude that Henderson was merely preparing to work on the system, that he had gathered some tools in preparation for such work, and that he was underneath

347. *Id.* at *6.

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.* at *7.

352. *Id.*

353. *Id.* at *2.

354. *Id.* at *10. Defendants alternatively argued that they were entitled to summary judgment because Henderson’s conduct amounted to a misuse of the truck. *Id.*; see *infra* Part IV.B.

355. *Id.* at *11.

356. *Id.*

357. *Id.* at *12.

the truck only to initially inspect the suspension system.³⁵⁸ “Perhaps most telling,” according to Judge Hamilton, “a jury could find that he put the deep well socket on the truck frame so that he would have more room to work after bleeding the air from the system.”³⁵⁹

“Henderson [clearly] understood that it was dangerous to work on a pressurized suspension system.”³⁶⁰ Indeed, he admitted in his deposition that he wanted to get the air out of the system before he removed the components to avoid an explosion.³⁶¹ According to Judge Hamilton, such an “understanding provides some evidence that weighs against the circumstantial evidence that defendants cite to argue that he began working while the system was still pressurized.”³⁶²

B. Misuse

Indiana Code section 34-20-6-4 provides that

[i]t is a defense to an action under [the IPLA] that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party.³⁶³

Knowledge of a product’s defect is not an essential element of establishing the misuse defense. The facts necessary to prove the defense of “misuse” many times may be similar to the facts necessary to prove either that the product is in a condition not contemplated by reasonable users or consumers under Indiana Code section 34-20-4-1(1) or that the injury resulted from handling, preparation for use, or consumption that is not reasonably expectable under Indiana Code section 34-20-4-3.

Recent decisions in cases such as *Barnard v. Saturn Corp.*,³⁶⁴ and *Burt v.*

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.* at *12-13.

363. IND. CODE § 34-20-6-4 (2005). Stated in a slightly different way, misuse is a “use for a purpose or in a manner not foreseeable by the manufacturer.” *Henderson*, 2005 U.S. Dist. LEXIS 5832, at *10 (internal quotation marks omitted) (quoting *Barnard v. Saturn Corp.*, 790 N.E.2d 1023, 1030 (Ind. Ct. App. 2003)).

364. 790 N.E.2d 1023 (Ind. Ct. App. 2003). *Barnard* was a wrongful death action against the manufacturers of an automobile and its lift jack. *Id.* at 1026-27. Plaintiff’s decedent was killed when he used a lift jack to prop up his vehicle while he changed the oil. The jack gave way, trapping the decedent underneath the car. *Id.* at 1027. Both manufacturers provided safety warnings regarding proper use of the jack that the decedent did not follow. *Id.* at 1026. For example, the decedent failed to block the tires while he used the jack, he used the jack when the vehicle was not on a flat surface, and he got underneath his vehicle while it was raised on the jack—all of these actions were contrary to the warnings provided by the manufacturers. *Id.* at 1030.

Makita USA, Inc.,³⁶⁵ have resolved the applicability of the misuse defense as a matter of law. The *Henderson* case, discussed in detail above in the context of the incurred risk defense, also involved the misuse defense. There, defendants argued that Henderson began working on the truck's air suspension system without first bleeding the air pressure from the system, which was a misuse because the truck's service manual requires that mechanics, among other things, disconnect the leveling valve and to exhaust all air from the springs.³⁶⁶ Judge Hamilton decided that the disputed issues of fact noted above precluded him from granting summary judgment that the misuse defense foreclosed recovery as a matter of law.³⁶⁷

As is the case with the incurred risk defense, courts applying Indiana law continue to reach contrary decisions with regard to whether misuse is a complete defense. In *Burt v. Makita USA, Inc.*,³⁶⁸ an Indiana federal district court recognized that the misuse of a product operates as a complete defense.³⁶⁹ Two other Indiana Court of Appeals decisions, *Indianapolis Athletic Club, Inc. v. Alco Standard Corp.*³⁷⁰ and *Morgen v. Ford Motor Co.*,³⁷¹ have held that a misuse is a "complete" defense under the IPLA, recognizing that the facts giving rise to a misuse defense effectively create an unforeseeable intervening cause, thus eliminating any need to compare fault.³⁷² On the other hand, decisions in cases

The trial court granted summary judgment to the defendants based upon product misuse, and the Estate appealed. The *Barnard* court ultimately affirmed the grant of summary judgment, holding as a matter of law that "no reasonable trier of fact could find that [the Decedent] was less than fifty percent at fault for the injuries that he sustained." *Id.* at 1031. As such, the resolution of the case by the *Barnard* court was practically identical to how the court in *Coffman* resolved an incurred risk question. For a more detailed analysis of *Barnard*, see Alberts & Bria, *supra* note 26, at 1286-87.

365. 212 F. Supp. 2d 893 (N.D. Ind. 2002). In *Burt*, the plaintiff was injured by a circular saw's blade guard. *Id.* at 894. The district court held that there was

no evidence that the defendants should have foreseen that someone would leave the blade guard in an incompletely installed position, or that someone would attempt to use the saw with the blade guard improperly attached. To the contrary, the evidence suggest[ed] that the accident was unforeseeable, caused by a very unusual set of factual circumstances.

Id. at 898. Accordingly, the defendants were not liable because the manner in which the injury occurred was not reasonably foreseeable as a matter of law. *Id.* That being the case, the statutory definition in Indiana Code section 34-20-4-1(1) had not been met, which necessarily also meant that the defense of "misuse" had been established as a matter of law. *Id.* at 898; *see also* Alberts & Boyers, *supra* note 35, at 1195-96.

366. *Henderson*, 2005 U.S. Dist. LEXIS 5832, at *5, *10.

367. *Id.* at *10-14.

368. 212 F. Supp. 2d 893 (N.D. Ind. 2002).

369. *Id.* at 897.

370. 709 N.E.2d 1070, 1072 (Ind. Ct. App. 1999).

371. 762 N.E.2d 137, 143 (Ind. Ct. App. 2002), *aff'd in part, vacated in part*, 797 N.E.2d 1146 (Ind. 2003), *reh'g denied* (Ind. 2004).

372. *Id.*

such as *Chapman v. Maytag Corp.*,³⁷³ and *Barnard v. Saturn Corp.*,³⁷⁴ have determined that the degree of a user's or a consumer's misuse is a factor to be assessed in determining that user's or consumer's "fault," which must then be compared with the "fault" of the alleged tortfeasor(s). The Indiana Supreme Court in *Morgen v. Ford Motor Co.*,³⁷⁵ acknowledged the conflicting authority, but did not address the issue.

The debate is interesting. The 1995 amendments to the IPLA changed Indiana law with respect to fault allocation and distribution in product liability cases. Indeed, the Indiana General Assembly provided that a defendant cannot be liable for more than the amount of fault directly attributable to that defendant, as determined pursuant to Indiana Code section 34-20-8, nor can a defendant be held jointly liable for damages attributable to the fault of another defendant.³⁷⁶ In addition, the IPLA now requires the trier of fact to compare the "fault" (as the term is defined by statute) of the person suffering the physical harm, as well as the "fault" of all others whom caused or contributed to cause the harm.³⁷⁷ The IPLA mandates that

[i]n assessing percentage of fault, the jury shall consider the fault of all persons who contributed to the physical harm, regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm.³⁷⁸

The statutory definition of "misuse" seems to consider only the objective reasonableness of the foreseeability of the misuse by the seller and not the character of the misuser's conduct. That would tend to explicitly demonstrate that "misuse" is not "fault." The district judge in *Chapman* recognized as much. As he also recognized that the Indiana General Assembly did not specifically exempt misuse from the scope of the comparative fault requirement.³⁷⁹

That the General Assembly may not have overtly indicated that it intended to exempt misuse from the scope of the comparative fault requirement does not

373. 297 F.3d 682 (7th Cir. 2003). In *Henderson*, Judge Hamilton cited *Chapman* for the proposition that "[t]he misuse defense is not necessarily a complete defense but is an element of comparative fault." 2005 U.S. Dist. LEXIS 5832, at *10. For a more detailed analysis of *Chapman*, see Alberts & Boyers, *supra* note 35, at 1196-97.

374. 790 N.E.2d 1023 (Ind. Ct. App. 2003). According to the *Barnard* court, "the defense of misuse should be compared with all other fault in a case and does not act as a complete bar to recovery in a products liability action." *Id.* at 1029. The *Barnard* court determined that the 1995 Amendments to the IPLA required all fault in cases to be comparatively assessed. *Id.* "By specifically directing that the jury compare all fault in a case, we believe that the legislature intended the defense of misuse to be included in the comparative fault scheme." *Id.* at 1030; see also Alberts & Bria, *supra* note 26, at 1286-87.

375. 797 N.E.2d 1146, 1148 n.3 (Ind. 2003).

376. IND. CODE § 34-20-7-1 (2005).

377. *Id.* § 34-20-8-1(a).

378. *Id.* § 34-20-8-1(b).

379. *Chapman v. Maytag Corp.*, 279 F.3d 682, 689 (7th Cir. 2003).

necessarily mean that it is exempted. After all, it would seem equally likely that the legislature's silence on the matter indicates an implicit recognition that the "complete" nature of the pre-1995 product liability defenses was to remain that way notwithstanding the introduction of some comparative fault principles *vis-a-vis* defendants and non-parties.³⁸⁰

C. Modification and Alteration

Indiana Code section 34-20-6-5 provides that

[i]t is a defense to an action under [the IPLA] that a cause of the physical harm is a modification or alteration of the product made by any person after the product's delivery to the initial user or consumer if the modification or alteration is the proximate cause of physical harm where the modification or alteration is not reasonably expectable to the seller.³⁸¹

The alteration defense is incorporated into the basic premise for product liability in Indiana as set forth in Indiana Code section 34-20-2-1. Indeed, the Indiana Code provides that

a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user's or consumer's property is subject to liability for physical harm caused by that product to the user or consumer or to the user's or consumer's property if . . . the product is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.³⁸²

Accordingly, if a claimant cannot establish or if a defendant conclusively proves that the product underwent some "substantial alteration" between the time of manufacture or sale and the time the injury occurred, the IPLA simply does not provide any relief as a threshold matter.³⁸³

One decision during the survey period addresses the "alteration" defense.

380. Before the 1995 amendments to the IPLA, misuse was a "complete" defense. *E.g.*, *Estrada v. Schmutz Mfg. Co.*, 734 F.2d 1218 (7th Cir. 1984).

381. IND. CODE § 34-20-6-5 (2005). Before the 1995 Amendments to the IPLA, product modification or alteration operated as a complete defense. *See Foley v. Case Corp.*, 884 F. Supp. 313, 315 (S.D. Ind. 1994).

382. IND. CODE § 34-20-2-1.

383. Indiana Pattern Jury Instruction 7.05(C) does not correctly reflect Indiana law in this regard. There is undeniable overlap within the statutory framework in this context. Because the alteration defense is incorporated directly into the basic premise for product liability in Indiana as set forth in Indiana Code section 34-20-2-1, there should be little controversy that the alteration/modification defense is "complete" in nature by the very statute that imposes product liability in Indiana as a threshold matter.

Recall in *Henderson*, a truck mechanic was injured while either working on or preparing to work on a Freightliner truck's air suspension assembly.³⁸⁴ The truck at issue had an auxiliary axle added to help handle additional weight.³⁸⁵ The axle was added sometime after its original manufacture but before Henderson's injury.³⁸⁶ Freightliner did not manufacture, design, or install the auxiliary axle.³⁸⁷

Freightliner argued that the addition of the auxiliary axle substantially altered the truck because "it increased the likelihood that a malfunction or failure of the suspension system or its component parts would occur."³⁸⁸ Freightliner contended that such "a substantial alteration was an unforeseeable intervening and proximate cause of Henderson's injuries" that entitled it to summary judgment.³⁸⁹ Judge Hamilton disagreed, concluding that Freightliner's evidence stopped "well short of claiming that the auxiliary axle actually contributed at all to the Henderson accident."³⁹⁰

Freightliner relied on three cases, *Wolfe v. Stork RMS-Protecon, Inc.*,³⁹¹ *Leon v. Caterpillar Industrial, Inc.*,³⁹² and *Bishop v. Firestone Tire & Rubber Co.*,³⁹³ in support of the argument that plaintiffs could not meet their burden of proof with respect to proximate cause.³⁹⁴ Judge Hamilton distinguished all three cases, pointing out that the alteration at issue in each case "was a direct and undisputed cause of the injury, and there was no evidence independent of the alteration that the product was defective when it left the control of the defendant manufacturer."³⁹⁵ According to Judge Hamilton, that was simply not the case in *Henderson*, and moreover, plaintiffs came forward with evidence from which "a jury could infer that the leaf spring and air spring with which the truck left Freightliner's control were the sole causes of the injury."³⁹⁶ Indeed, the court wrote that Freightliner did not "come forward with evidence tending to show that the auxiliary axle contributed to this injury in any way" and that its opinion witness "testified only vaguely that the alteration 'increased the likelihood' that some unspecified 'malfunction or failure of the suspension system or its component parts would occur.'"³⁹⁷

384. *Henderson v. Freightliner, LLC*, No. 1:02-cv-1301-DHF-WTL, 2005 U.S. Dist. LEXIS 5832 (S.D. Ind. Mar. 24, 2005).

385. *Id.* at *7.

386. *Id.*

387. *Id.*

388. *Id.* at *22-23.

389. *Id.* at *23.

390. *Id.*

391. 683 N.E.2d 264 (Ind. Ct. App. 1997).

392. 69 F.3d 1326 (7th Cir. 1995).

393. 814 F.2d 437 (7th Cir. 1987).

394. *Henderson*, 2005 U.S. Dist. LEXIS 5832, at *24.

395. *Id.* at *24-25.

396. *Id.* at *28-29.

397. *Id.* at *29. Plaintiffs also pointed to additional evidence that the auxiliary axle was in place and was supporting part of the weight of the truck's load at the time of the accident, which

The result of the court's ruling in *Henderson* was that the statutory "alteration" defense did not preclude recovery as a matter of law.³⁹⁸ Freightliner was free to make its "substantial alteration argument to a jury."³⁹⁹

CONCLUSION

The 2005 survey period once again proved that this is an important and thought-provoking time for product liability practitioners and judges in Indiana.

tended "to show that the auxiliary axle contributed nothing to the accident." *Id.*

398. *Id.*

399. *Id.*

SURVEY OF THE LAW OF PROFESSIONAL RESPONSIBILITY: PROSECUTING ATTORNEYS AND BREACHING THE PUBLIC'S TRUST

CHARLES M. KIDD*

I. IMPROPER SEIZURE OF CRIMINAL DEFENDANT'S DEPOSITION NOTES

An important ethics decision by the Indiana Supreme Court during the survey period was actually a consolidated case involving two lawyers. In *In re Winkler*,¹ the respondent lawyers were serving as the elected Prosecuting Attorney for Washington County and her deputy, respectively.² In 2003, they were both present during a deposition in a criminal case.³ During the course of the deposition, the defendant made notes and had discussions with his counsel while sitting across the table from the respondent prosecutors. When the defendant and his lawyer left the room for a discussion, he turned his notepad face down on the table. Respondent Goode then seized the notes, tore them from the legal pad and gave them to Winkler. Winkler, in turn, concealed them by placing them in a stack of files on the table. The respondent lawyers wanted to use the notes for an exemplar of the defendant's handwriting to compare with other evidence in the criminal case. When the defendant and his counsel returned to the deposition room, neither Winkler nor Goode told them that they had seized the notes. Both the defendant and his lawyer began a search for the notes and Winkler went as far as shuffling through her files as a pretense for looking for them. When the defendant saw the edge of a yellow piece of paper sticking out of the pile of files, he specifically asked respondent Winkler if that was his notes. She finally acknowledged having the notes and returned them to the defendant.⁴

The respondents were charged with a variety of violations, including: Indiana Professional Conduct Rule 4.1, which prohibits a lawyer from making a false statement of material fact to a third person,⁵ Indiana Professional Conduct Rule 4.4, which prohibits a lawyer from obtaining evidence by means that violate

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1. 834 N.E.2d 85 (Ind. 2005) (per curiam).

2. *Id.* at 87.

3. *Id.* at 88.

4. *Id.*

5.

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 [governing confidential communications].

the rights of a third person,⁶ Indiana Professional Conduct Rule 8.4(c), making it misconduct for a lawyer to engage in conduct involving dishonesty,⁷ and Indiana Professional Conduct Rule 8.4(d), making it misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.⁸ After trial, they were both found to have committed all the violations as alleged. The Hearing Officer who took evidence in the case found respondent Winkler, the elected prosecutor, to be more culpable and recommended a ninety-day suspension from the practice of law.⁹ Furthermore, he recommended that Goode receive a sixty-day suspension.¹⁰ Although both lawyers asked the supreme court to review the case, Goode did not challenge the findings made by the Hearing Officer but, instead, asked that his sanction be made a public reprimand with no time suspended from the bar. The supreme court imposed the full sixty-day suspension on Goode, but increased the sanction on Winkler from the ninety days proposed by the Hearing Officer to 120 days.¹¹

The supreme court used this opinion to discuss the important ethics issues associated with the criminal justice system. The court noted the important state interest in maintaining the confidentiality of communications between an attorney and client and noted that it is one of the cornerstones of the right to assistance of counsel guaranteed by the United States Constitution.¹² The court then criticized the respondents for infringing on that relationship by seizing a criminal defendant's notes without the benefit of a search warrant, subpoena, or court order of any kind.¹³ Clearly, such behavior violated the rights of third person. The court also repeated an observation that it has made repeatedly in past cases: prosecutors are held to a higher standard in Indiana.¹⁴ Although the court certainly did not like the idea of prosecutors taking another person's notes, it found the respondents' attempts to conceal their misconduct even more

6.

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Id. R. 4.4.

7. "It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]" *Id.* R. 8.4(c).

8. "It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice[.]" *Id.* R. 8.4(d).

9. *In re Winkler*, 834 N.E.2d at 88.

10. *Id.*

11. *Id.* at 90.

12. *Id.* at 88 (citing *Maine v. Moulton*, 474 U.S. 159 (1985)).

13. *Id.*

14. *Id.* at 89 (citing *In re Seat*, 588 N.E.2d 1262 (Ind. 1992)).

distressing. The court was very critical of respondent Winkler's deception to her opposing counsel in the criminal case and her lack of insight in failing to acknowledge her misconduct before the Hearing Officer in her discipline case.¹⁵ Perhaps the most important language from the opinion was

Prosecutors are not simply advocates, but they are also "... ministers of justice. . . . This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice" As such we hold prosecutors to a high standard of ethical conduct. Here, blinded by their zealous quest to prosecute the defendant, respondents lost sight of basic ethical considerations. It is important that all lawyers understand that it is unacceptable to tolerate litigation premised on "the end justifies the means."¹⁶

As noted previously, this is not the first time the supreme court has been called upon to examine misconduct committed by prosecutors. The vast majority of such cases, however, involve personal misconduct on the part of the lawyer who by coincidence is also a prosecutor.¹⁷ In *In re Winkler* the court recognized that there were valid ways in which the criminal defendant could be compelled to give a handwriting exemplar.¹⁸ Extensive misconduct like that in *In re Winkler* is rare. In *In re Riddle*,¹⁹ the respondent's service as a prosecutor happened to be the exact reason he committed misconduct. As a full time prosecuting attorney, a lawyer promises to devote his full professional efforts to the service of his client, the State of Indiana.²⁰ In *In re Riddle*, that lawyer tried to maintain a private practice in addition to his elected office and concealed the fact from the judges and other lawyers in the county by hiring a young lawyer to serve as a part time deputy prosecutor while purportedly taking over the respondent lawyer's private practice.²¹ The respondent was charged with a variety of misconduct including committing the crime of ghost employment.²² In its opinion permanently disbarring the respondent, the supreme court found that his offenses and steadfast lack of remorse struck at the very heart of public trust.²³ The same sentiment from the court echoes through its analysis in *In re Winkler*.

15. *Id.* at 89-90.

16. *Id.* at 90 (internal citation omitted).

17. See *In re Oliver*, 493 N.E.2d 1237 (Ind. 1986) and *In re Schenk*, 612 N.E.2d 1059 (Ind. 1993), where two prosecutors were involved in alcohol related incidents while driving. In *In re Oliver*, the supreme court announced the elevated standard for examining the conduct of prosecuting attorneys based on their special status as enforcers of the law.

18. *In re Winkler*, 834 N.E.2d at 88.

19. 700 N.E.2d 788 (Ind. 1998).

20. *Id.* at 794 (citing IND. CODE § 33-14-7-19.5 (1998) regarding the full time prosecutor's exclusive duty to the State of Indiana).

21. *Id.* at 791-93.

22. *Id.*

23. *Id.* at 795.

II. FORBIDDEN ATTACK ON RACE AND ETHNICITY

Also during the survey period, the supreme court had an opportunity to examine and apply a relatively new provision to Indiana Professional Conduct Rule 8.4(g).²⁴ The provisions of Rule 8.4 govern the lawyer's conduct as a member of society. It prohibits, for example, engaging in acts of deceit or criminal acts.²⁵ In a nutshell, subsection (g) forbids a lawyer from manifesting bias or prejudice based on, inter alia, another person's race, gender, religion, age, or sexual orientation. In order to find a violation of the rule, a showing is required that the lawyer was acting in a professional capacity and that the acts cannot be attributed to legitimate advocacy.²⁶

The first Indiana disciplinary case decided under this rule was *In re Thomsen*.²⁷ Although the case was tendered to the supreme court by an agreed settlement, the court issued a per curiam opinion on November 29, 2005. In its opinion, the court accepted the tendered resolution of a public reprimand to be imposed on the respondent lawyer. In *In re Thomsen*, the respondent lawyer represented the husband in a marriage dissolution action wherein the custody of the parties' children was a contentious issue in the case.²⁸ In the petition for custody that the respondent filed on behalf of the husband, she made repeated references to a man as a "black male" who had purportedly been seen with the wife and who also purportedly resided with the wife and children for a period of time. Furthermore, at three separate hearings, the respondent occasionally referred to this individual by his proper name, but also regularly referred to him as "the black guy" or "the black man."²⁹ She did not make or substantiate any argument to the trial court that the race of this individual was germane to the issues raised in the dissolution or custody case. In one speech excerpted in the opinion, the respondent had the following exchange: "Further, when the wife testified that a ' . . . black kid across the street [was] yelling racial slurs at them . . . , ' respondent replied, 'Well, you're used to that. I mean you have them in your home.'"³⁰

24.

It is professional misconduct for a lawyer to: . . .

(g) engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

IND. PROF'L CONDUCT R. 8.4(g).

25. *Id.* R. 8.4(c).

26. *Id.* R. 8.4(g).

27. 837 N.E.2d 1011 (Ind. 2005) (per curiam).

28. *Id.* at 1011.

29. *Id.* at 1012.

30. *Id.*

The court found the respondent's conduct appalling and found that her racially insensitive remarks could "only serve to fester wounds caused by past discrimination and encourage future intolerance."³¹ It was careful to point out that legitimate advocacy respecting the factors spelled out in Rule 8.4(g) does not violate the Rules of Professional Conduct.³² This respondent's comments, however, were "unnecessary," "inappropriate," and, as such, were "offensive, unprofessional and tarnish[ed] the image of the profession as a whole."³³ Where, as in this case, there is no *legitimate* reason for the conduct, it cannot be taken lightly. Hence, the court agreed to impose the disciplinary sanction proffered by the parties of a public reprimand. The court specifically noted, "[t]here is no place for such conduct in our courts."³⁴

As noted in a prior professional responsibility survey article,³⁵ when the rule was adopted, Indiana's acceptance of a version of Rule 8.4(g) was neither unique nor a simple nod to political correctness. Many states have adopted such rules but, because of their newness, there was a dearth of decided cases on the issue.³⁶ The *In re Thomsen* case might be a good reminder to lawyers and law firms to review their thoughts and, if they exist, their policies regarding socially sensitive topics like race or sexuality in dealing with people within the law firm and outside of the law firm. In the opinion, the court made clear that there might be occasions when such references constituted *legitimate* advocacy. Neither the *In re Thomsen* opinion nor the rule defines the limits of *legitimate* advocacy in this regard but a law firm would be well advised to review this case with its members as a reminder about these issues.

III. LAWYERS' DUTY TO COOPERATE WITH THE DISCIPLINARY COMMISSION

Although procedural issues in discipline actions admittedly do not usually make for riveting reading, one decision during the survey period should catch lawyers' attention: *In re Clark*.³⁷ It covers an issue not frequently addressed in the procedural aspects of lawyer disciplinary actions: the duty to respond. Lawyers are required under Indiana Admission and Discipline Rule 23 to cooperate with the investigation of misconduct by the Disciplinary Commission.³⁸ In *In re Clark*, the respondent lawyer was charged with two counts of failing to respond to demands for information from the Disciplinary

31. *Id.*

32. *Id.* The supreme court did not give specific acts it thought fell within the terms of the rule, but one obvious example where race, ethnicity, or other physical characteristics of an individual might come into play is identification of criminal defendants or witnesses.

33. *Id.* at 1012.

34. *Id.*

35. Charles M. Kidd, *Survey of the Law of Professional Responsibility*, 35 IND. L. REV. 1477 (2002).

36. *Id.* at 1485-87.

37. 834 N.E.2d 653 (Ind. 2005) (per curiam).

38. IND. ADMIS. DISC. R. 23(10)(e) (2005).

Commission.³⁹ Failing to respond is a substantive violation of the Indiana Rules of Professional Conduct and is found in rule 8.1(b).⁴⁰ Thus, the respondent lawyer in *In re Clark* found himself charged with two counts of misconduct. After the matter was tried to a Hearing Officer, the supreme court agreed and found that the respondent lawyer deserved to be suspended from the practice of law for ninety days.⁴¹

In *In re Clark*, the Disciplinary Commission received a grievance against the respondent and asked him to respond to its allegations.⁴² Despite repeated reminders, the respondent failed to respond, and in December 2001, the Commission filed a proceeding with the supreme court to have the lawyer suspended until such time as he responded.⁴³ At about that time, the respondent answered the grievance and the court granted the Commission's motion to dismiss its request for a suspension thereafter. After a similar situation arose in 2002 and the respondent did not answer the grievance for approximately six months, another proceeding was started that October to suspend him until such time as he responded to the grievance. In November, he answered the grievance and in December, the supreme court dismissed its show cause order. The Disciplinary Commission then filed a formal disciplinary action against Clark for failing to respond to a demand for information from the Commission.⁴⁴ The case was not settled, but instead, the matter was tried to a Hearing Officer. The

39. *In re Clark*, 834 N.E.2d at 654.

40.

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not: . . .

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

IND. PROF'L CONDUCT R. 8.1(b).

41. *In re Clark*, 834 N.E.2d at 656.

42. *Id.* at 654.

43. *Id.*; IND. ADMIS. DISC. R. 23(10)(f). This is what lawyers commonly refer to as a "show cause" petition. Once the action is begun, the supreme court issues an order to the respondent lawyer requiring him or her to "show cause" why he or she should not be suspended from the practice until such time as he cooperates with the Commission. If a lawyer is suspended on this basis for more than six months, the suspension becomes indefinite and requires the lawyer to petition for reinstatement. IND. ADMIS. DISC. R. 23(10)(f)(4).

44. *In re Clark*, 834 N.E.2d at 655. The significance is that there is a different procedure in so-called "failure to cooperate" cases that is relatively summary in nature. It is found in Indiana Admission and Discipline Rule 23 and brings the offending lawyer to the attention of the supreme court immediately, but only with respect to the cooperation issue. After Clark's failure to cooperate cases were dismissed, the conduct was considered by the full Disciplinary Commission for a determination as to whether it rose to the level of a violation of Indiana's Rules of Professional Conduct under Rule 8.1(b).

Hearing Officer found, and the supreme court agreed, that the respondent had, in fact, violated the rule.

Here, respondent chose to repeatedly ignore the Commission's requests for information regarding grievances pending against him. Respondent has demonstrated an unwillingness to comply with even this basic professional obligation. The Commission went out of its way to give respondent the opportunity to comply with its requests before seeking action from this Court. Despite the Commission's generous grant of extensions and follow up letters, which is [sic] was not required to send, respondent still did not provide timely responses to the Commission.⁴⁵

The court then engaged in a lengthy examination of similar cases and noted the respondent's prior history of failing to cooperate with the Commission's demands for information. That examination culminated with the recognition that the respondent had displayed "disdain" for the Commission that, by extension, was an expression of disdain of the court itself.⁴⁶

What makes this case noteworthy in terms of this survey article is the explicit nature of the court's warning to this respondent and, vicariously, that portion of the bar that might be tempted to give the disciplinary process something less than the highest priority.

[W]e advise respondent that he should be aware that future misconduct may warrant a sanction up to and including disbarment. *We also feel obliged to remind the bar in general that failure to cooperate with Commission requests for information may result not only in an order to show cause, but also a suspension from the practice of law. Ignoring the Commission's efforts to assist this Court in carrying out its duty to protect the public and uphold the integrity of the profession will not be tolerated.*⁴⁷

After that, the court imposed a ninety-day suspension on the respondent lawyer.⁴⁸

IV. UNAUTHORIZED PRACTICE OF LAW: NON-INDIANA LAWYERS

The Indiana Supreme Court also addressed an area not often examined in *In re Hughes*.⁴⁹ The respondent received a public reprimand for his agreed to misconduct. He maintained a law office in the town of Highland in Lake County, Indiana. During the relevant time, the lawyer represented the plaintiffs in a civil action in the Jasper County Superior Court. He appeared at the original case management conference and at the final pretrial conference. In between the two events, another individual appeared to handle other events, including taking

45. *Id.*

46. *Id.*

47. *Id.* at 656 (emphasis added).

48. *Id.*

49. 833 N.E.2d 459 (Ind. 2005) (per curiam).

depositions.⁵⁰ That individual was a lawyer in Michigan, but not in Indiana.⁵¹ In essence, the respondent had used a nonlawyer to practice law from his office. He also put the Michigan lawyer's name on his letterhead as one of the Indiana lawyers and the phone message at the firm identified the nonlawyer as a member of the firm. The court found that the respondent not only assisted in the unauthorized practice of law in violation of Rule 5.5(b),⁵² but engaged in a violation of Rule 7.2(b)⁵³ by holding the Michigan lawyer out to the public as someone who was able to practice law in Indiana.⁵⁴ Because the matter was settled through the respondent's cooperation with the Disciplinary Commission, the respondent may very well have avoided a much more serious sanction at the end of this case. The practice of law in Indiana by someone who may hold the title of lawyer in another state is not a small matter to be overlooked. The supreme court has extensive rules regarding who may practice in Indiana. This includes those who would practice on a *pro hac vice* basis.⁵⁵ The Michigan lawyer at issue in *In re Hughes* also did not qualify as one engaged in Multijurisdictional Practice ("MJP") as that term is used in the Indiana Rules of Professional Conduct.⁵⁶ MJP is an extensive scheme of rules and presumptions that allow non-Indiana lawyers to practice here in certain specific circumstances that are identified in the rule. Indiana lawyers are similarly able to engage in the practice of law in those states that have their own MJP rules. That kind of practice was not a consideration in *In re Hughes*.

50. *Id.* at 460.

51. *Id.* That lawyer's name was Nick Zotos.

52.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

- (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
- (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

IND. PROF'L CONDUCT R. 5.5(b).

53.

- (b) A lawyer shall not, on behalf of himself, his partner or associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

Id. R. 7.2(b).

54. *In re Hughes*, 833 N.E.2d at 461.

55. IND. ADMIS. DISC. R. 3 explains the manner by which a non-Indiana lawyer can get temporary admission to practice in a specific Indiana court for a specific matter by applying through the office of the Clerk of the Supreme Court.

56. IND. PROF'L CONDUCT R. 5.5 and 8.5 cover the topic and were new, effective January 1, 2005. These were covered in Donald R. Lundberg & Charles M. Kidd, *Survey of the Law of Professional Responsibility You Say You Want an Evolution?: An Overview of the Ethics 2000 Amendments to the Indiana Rules of Professional Conduct*, 38 IND. L. REV. 1255 (2005).

V. UNAUTHORIZED PRACTICE OF LAW: NON-LAWYERS

The court also addressed the unauthorized practice of law issue. Under Indiana Admission and Discipline Rule 24, the Indiana State Bar Association and other entities have the authority under the rules to bring actions for the unauthorized practice of law (“UPL”) in this state, and they have done so throughout the years. Most recently, the association did so in *State ex rel. Indiana State Bar Ass’n v. Diaz*.⁵⁷ In *Diaz*, the Indiana Supreme Court was asked to examine the practices of a woman named Ludy Diaz⁵⁸ in Goshen, Indiana. Although born in Puerto Rico, she has lived in northern Indiana for many years and has identified herself as an “immigration counselor” and offered translation services for at least the last ten years. She also owned and used immigration form software and attended seminars on immigration related topics. On the outside of her office, she had a sign that read, “notary public.”⁵⁹ The Spanish translation of those words is literally “notario publico,” but the term has a specific connotation for those from Mexico and other Latin American countries.⁶⁰ Diaz had her Indiana notary certificate framed and hanging in her office and used the term “Notario Publico” on her business cards. She did not advise people that she was not a lawyer or a notario as that term of art is used but advertised her services in *El Puente*, a Spanish language publication in Elkhart County.⁶¹

The primary problems with Diaz’s practices revolved around her work on immigration law matters. More specifically, Diaz filled out forms for people and made pleas for mercy on their behalf before the various agencies that have dealt with immigrants’ residency status over the years. These included the Immigration and Naturalization Service (“INS”) and its successor agencies like the Bureau of U.S. Citizenship and Immigration Services (“USCIS”) and the Bureau of Immigration and Customs Enforcement (“ICE”).⁶² As any lawyer would immediately surmise, dangers lurk around every corner when an untrained or inexperienced person is dealing with these agencies. Thus, problems arose when Anjelica Hernandez and Fructuoso Espinoza hired Diaz to help Espinoza remain in the U.S. lawfully. Diaz took a fee and completed forms for them to file

57. 838 N.E.2d 433 (Ind. 2005) (per curiam).

58. Although Diaz could be referred to as “respondent” because she is so designated in the opinion that bears her name, she will be referred to Diaz in this article simply as a convention to distinguish that she was not a lawyer. She is referred to as Diaz throughout the court’s decision as well. The term respondent is used throughout the balance of the survey article to denominate the lawyers that were the subject of disciplinary action.

59. *Diaz*, 838 N.E.2d at 438-39.

60. *See id.* at 447. Used in the latter sense, a “notario” is a quasi-public official who is an experienced lawyer who has passed rigorous additional examinations beyond law school. The court’s opinion devotes an extensive part of its body to describing important points of immigration law and the importance of “notarios” in Latin American society and such an exposition will not be provided here.

61. *Diaz*, 838 N.E.2d at 439.

62. *Id.*

with federal agencies in an attempt to change Espinoza's residency status to one that would allow him to remain with Hernandez and their child in this country.

During their second trip from northern Indiana to Indianapolis for interviews with the INS, the couple was separated and Hernandez was informed that Espinoza was being detained for subsequent deportation.⁶³

Hernandez contacted Diaz and obtained a copy of Diaz's file on Espinoza's matter. Diaz told Hernandez to just "send a letter" to INS and that a lawyer would "charge a lot of money and it would not do any good."⁶⁴ Diaz did not recognize at the time she worked for Espinoza that a prior incident in which he used false documentation in an immigration matter was a serious offense. Diaz's services for other immigration "clients" are generally described in the court's opinion as well.⁶⁵

In analyzing Diaz's conduct, the court gave a detailed examination of two UPL cases in particular: *State ex rel. Indiana State Bar Association v. Indiana Real Estate Ass'n*.⁶⁶ and *Miller v. Vance*.⁶⁷ In *Indiana Real Estate*, the Indiana State Bar Association initiated a case against a realtors trade group alleging that the assisting of person in filling out real property transfers constituted the unauthorized practice of law.⁶⁸ The bar association claimed that in so doing, the realtors were engaging in acts that only an attorney could do. In *Miller*, the court was asked to consider whether the filling out of a mortgage instrument by a nonlawyer bank employee was also the unauthorized practice of law.⁶⁹ In both cases, the court recognized the important interests at stake in the acts being performed by nonlawyers, but found that in the cases presented, those acts did not constitute the unauthorized practice of law because the chance for errors was low.⁷⁰ The situation in *Diaz* was different because there was nothing in the cases presented that suggested the services being provided were "routine transactions" in any sense.⁷¹

[E]ach case is unique and the procedures can be complex. The choice of a form and the information to include in its blanks can turn on subtle facts that may not be apparent to those without legal training.

Moreover, Diaz's immigration services went far beyond the use of

63. *Id.* at 440-41.

64. *Id.* at 442.

65. *Id.* at 440-41.

66. 191 N.E.2d 711 (Ind. 1963).

67. 463 N.E.2d 250 (Ind. 1984).

68. *Ind. Real Estate*, 191 N.E.2d at 713.

69. *Miller*, 463 N.E.2d at 251.

70. See *Diaz*, 838 N.E.2d at 444, for the court's discussion of some of its past unauthorized practice of law ("UPL") cases. The opinion recited that which the court so often observes in UPL cases, that the "core element of practicing law is the giving of legal advice to a client." *Id.* (citing *State ex rel. Disciplinary Comm'n v. Owen*, 486 N.E.2d 1012, 1013 (Ind. 1986)).

71. See *id.* at 445.

forms. She held herself out as providing immigration services. She advised clients on many aspect of immigration law, she wrote letters, motions, and appeals to immigration officials on behalf of clients, and she accompanied clients to the immigration office. Beyond immigration law, she ventured into drafting contracts, a pleading, and at least one will. In many cases, her understanding of the underlying law was incomplete, her advice or the documents she prepared were faulty, and her clients suffered.

The Court also notes that Diaz promised absolute confidentiality to her clients. However, because she is not an attorney, the sensitive information her clients disclose to her regarding their immigration status and other matters is not protected by the attorney-client privilege. The fact that she promised such confidentiality further suggests she was holding herself out as a “notario,” rather than a “notary.”⁷²

The court, of course, enjoined Diaz from engaging in any activity that might be considered the practice of law and spelled out a number of those activities in the opinion.⁷³ In general, the court was very critical of the misuse of the concept of “notary public” as a possibly deliberate attempt to confuse it with the more complex services provided by a “notario,” for which there is no corresponding entity in the United States.⁷⁴

This case is not only important for its impact in protecting the public from those who should not be practicing law, but it also provides important insight into the supreme court’s thinking about protecting segments of the public that might be uniquely vulnerable. It has a number of citations to resources about legal thinking on this specific problem. For example, the court refers to, inter alia, a *Harvard Latino Law Review* note on the exploitation of vulnerable Latino immigrants.⁷⁵ In the end, the court concluded,

The answer to these unmet needs, however, is not permitting unqualified practitioners to provide inadequate services. Incompetence in the complexities of immigration law can have disastrous results because filing the wrong document, missing a deadline, or misjudging the relief available to a client can mean the difference between legal status and deportation (which, for asylum seekers, may carry the risk of death if returned to their native lands.)⁷⁶

Diaz was permanently enjoined from the unauthorized practice of law.

72. *Id.* at 445-46.

73. *Id.* at 448.

74. *Id.* at 446.

75. Anne E. Langford, *What’s in a Name?: Notarios in the Unites States and the Exploitation of a Vulnerable Latino Immigrant Population*, 7 HARV. LATINO L. REV. 115 (2004).

76. *Diaz*, 838 N.E.2d at 446.

VI. LAWYER-CLIENT RELATIONSHIP: FORBIDDEN POST-MORTEM
ESTATE PLANNING

In a curious act of wrongdoing, a lawyer in *In re Gofourth*⁷⁷ assisted in the creation of a Last Will and Testament for a man who was already dead. In November 2004, a man died without a will.⁷⁸ His estate was valued between \$50,000 and \$100,000. Having died intestate, his estate should have been divided equally between his heirs: his mother, his father, and his brother. Several weeks after the man's death, his father, who was an acquaintance of the respondent, approached the lawyer about drafting a will for the decedent. The lawyer then drafted such an instrument giving the bulk of the estate to the father.⁷⁹ The father forged his dead son's signature on the will in the respondent's presence. The decedent's mother contested the will. The respondent lawyer initially insisted the will was genuine, but eventually admitted the plot and confessed his misconduct to the local circuit court judge.⁸⁰ Respondent was later charged with forgery and perjury and ended up pleading guilty to perjury, a Class D Felony. The court found he violated Indiana Professional Conduct Rule 1.2(d)⁸¹ for assisting a client in a fraudulent act; Indiana Professional Conduct Rule 8.4(b) for committing a criminal act that reflects adversely upon a lawyer's honesty, trustworthiness, or fitness as a lawyer;⁸² and Indiana Professional Conduct Rule 8.4(c) for committing an act involving dishonesty.⁸³ He was suspended from the practice of law for three years, without automatic reinstatement to the Bar.⁸⁴ Justice Dickson dissented, saying the respondent should have been disbarred.⁸⁵ Essentially, that means the respondent may petition to reinstate his license in three years, but if he were disbarred, he could never get his license back.⁸⁶

77. 839 N.E.2d 690 (Ind. 2005).

78. *Id.* at 690.

79. *Id.*

80. *Id.*

81.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

IND. PROF'L CONDUCT R. 1.2(d).

82. "It is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects[.]" *Id.* R. 8.4(b).

83. "It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]" *Id.* R. 8.4(c).

84. *GoFourth*, 839 N.E.2d at 690.

85. *Id.* at 691 (Dickson, J., dissenting).

86. *See* IND. ADMIS. DISC. R. 23(3) (2005).

VESTED RIGHTS, EXCLUSIVE USES, AND ADVERSE POSSESSION: RECENT DEVELOPMENTS IN INDIANA REAL PROPERTY LAW

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This Article takes a topical approach to the notable real property cases in this survey period, October 1, 2004, through September 30, 2005, and analyzes noteworthy cases in each of the following areas: land use law, real estate contracts, landlord/tenant law, and developments in the common law of property.

I. LAND USE LAW

A. *Revisiting the Vested Rights Doctrine in Indiana*

*Metropolitan Development Commission of Marion County v. Pinnacle Media, LLC*¹ first arose in 1999, when Pinnacle Media (“Pinnacle”), which develops billboards, applied for a permit to build two signs in a railroad corridor near I-465. The Department of Metropolitan Development of Marion County (“DMD”) responded to Pinnacle’s request with a letter that stated that the land in question was unzoned and that DMD therefore lacked jurisdiction to issue or require an improvement location permit.² Pinnacle applied for and received permits to build from the Indiana Department of Transportation (“INDOT”), which were required because the sites were in a state highway right-of-way. After building the first two signs, Pinnacle leased more unzoned property in Marion County with the intention of building fifteen more signs. Pinnacle did not apply for improvement location permits from DMD for the additional signs, but did submit applications for permits to INDOT.³ After Pinnacle had filed the last of its permits with INDOT, DMD proposed an amendment to the Zoning Ordinance of Marion County, Indiana which filled in the gaps of the ordinance by assigning zoning classifications to any unzoned land in the county, including

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1. 836 N.E.2d 422 (Ind. 2005), *aff’d on reh’g*, 846 N.E.2d 654 (Ind. 2006).

2. *Id.* at 423.

3. Brief of Appellee at 6, *Metro. Dev. Comm’n of Marion County v. Pinnacle Media, LLC*, 836 N.E.2d 422 (Ind. 2005) (No. 49S05-0511-CV-510).

the fifteen sites leased by Pinnacle (the “Amendment”).⁴ INDOT subsequently denied all fifteen building permits requested by Pinnacle.⁵ A few months later, the City-County Council of the City of Indianapolis and Marion County enacted the Amendment.⁶ Following an appeal by Pinnacle of its denial, INDOT agreed to grant ten of the fifteen permits. Shortly after construction began on the first sign, DMD issued a stop work order because Pinnacle failed to obtain an improvement location permit.⁷

Pinnacle filed an action against DMD asking for a declaratory judgment that the Amendment did not apply to the billboards for which INDOT permits were pending at the time the Amendment was passed. The trial court granted summary judgment in favor of Pinnacle. DMD appealed, and the court of appeals upheld the grant of summary judgment. DMD requested transfer, and the Indiana Supreme Court granted transfer and reversed the trial court.⁸

The supreme court held that “[b]ecause no construction or other work that gave Pinnacle a vested interest in the billboard project had begun on the billboards at the time of the ordinance change, the ordinance change did apply to the 10 billboards.”⁹ To arrive at this holding, the court discussed two lines of Indiana cases which define “vested rights” in two different circumstances.¹⁰ The first line of cases discuss the zoning law principle of nonconforming use. The court cited the general rule that a change in the applicable zoning ordinance will not disturb an existing nonconforming use.¹¹ The court focused its discussion on a 1951 case, *Lutz v. New Albany City Plan Commission*,¹² which it found to be directly on point. In *Lutz*, the developer had acquired an unzoned parcel, which had previously been used for single family homes, for the purpose of building a gas station. After the developer had obtained financing and entered into a lease with a company to operate the service station, but before construction began, the city enacted a zoning ordinance that prohibited a gas station on the parcel.¹³ The developer appealed a subsequent denial of a variance request, arguing that he had acquired a vested right in developing the property as a gas station prior to the enactment of the zoning ordinance and that the application to him was therefore unconstitutional.¹⁴ The trial court and the supreme court upheld the application of the ordinance in *Lutz*:

4. *Id.* at 7.

5. *Pinnacle Media*, 636 N.E.2d at 424.

6. *See* INDIANAPOLIS, IND., REV. CODE §§ 730-100 to -103.

7. Brief of Appellee at 8, *Pinnacle Media*, 836 N.E.2d 422 (Ind. 2005) (No. 49S05-0511-CV-510).

8. *Pinnacle Media*, 836 N.E.2d at 424-25.

9. *Id.* at 423.

10. *Id.* at 425.

11. *Id.*

12. 101 N.E.2d 187 (Ind. 1951).

13. *Pinnacle Media*, 836 N.E.2d at 426.

14. *Id.*

The zoning ordinance herein is, of course, subject to any vested rights in the property of appellants acquired prior to the enactment of the zoning law. But where no work has been commenced, or where only preliminary work has been done without going ahead with the construction of the proposed building, there can be no vested rights. The fact that ground had been purchased and plans had been made for the erection of the building before the adoption of the zoning ordinance prohibiting the kind of building contemplated, is held not to exempt the property from the operation of the zoning ordinance. Structures in the course of construction at the time of the enactment or the effective date of the zoning law are exempt from the restrictions of the ordinance. The service station was not in the course of construction so as to give to appellants vested rights, and was not a nonconforming use existing at the time of passage of the ordinance.¹⁵

The second line of cases discussed by the court in *Pinnacle* have been used for the proposition that if a person has submitted an application for a permit with a governmental agency, a subsequent change in the law cannot be applied to that pending permit. The leading case in this line is *Knutson v. State ex rel. Seberger*,¹⁶ a 1959 subdivision plat case that held that “a municipal council may not, by the enactment of an emergency ordinance, give retroactive effect to a pending zoning ordinance thus depriving a property owner of his right to a building permit in accordance with a zoning ordinance in effect at the time of the application of such permit.”¹⁷ *Knutson* has been relied upon broadly by the supreme court and the court of appeals as recently as 2004 “for the proposition that a change in law cannot be applied retroactively” if an application for a permit has been submitted to a governmental agency at the time of the change.¹⁸

The court found that these two lines of cases are consistent in one respect, that is changes in zoning ordinances are “subject to any vested rights,” and that such changes “are unconstitutional if they disturb or destroy existing or vested rights.”¹⁹ The court found “uneasy tension” between *Lutz* and *Knutson* with respect to the question of when those rights vest. “If the land acquisition, demolition, and site preparation work in *Lutz* is not enough to establish a vested interest, how can it be that the mere filing in *Knutson* of a building permit (when, by definition, no construction has yet begun) is enough to do so?”²⁰ The court

15. *Id.* (quoting *Lutz*, 101 N.E.2d at 190).

16. 160 N.E.2d 200 (Ind. 1959).

17. *Pinnacle Media*, 836 N.E.2d at 427 (quoting *Knutson*, 160 N.E.2d at 201).

18. *See, e.g.*, *Fulton County Advisory Plan Comm’n v. Groninger*, 810 N.E.2d 704, 707-08 (Ind.), *reh’g denied* (Ind. 2004); *Equicor Dev., Inc. v. Westfield-Washington Twp. Plan Comm’n*, 758 N.E.2d 34, 40 (Ind. 2001); *Steuben County Waste Watchers v. Family Dev., Ltd.*, 753 N.E.2d 693, 703 n.7 (Ind. Ct. App. 2001); *Brant v. Custom Design Constructor Corp.*, 677 N.E.2d 92, 98 (Ind. Ct. App. 1997).

19. *Pinnacle Media*, 836 N.E.2d at 427.

20. *Id.*

concluded that the proper resolution of this apparent disconnect was to overrule *Knutson* to the extent that it stands for the proposition that “having a building permit on file creates a vested right that cannot be overcome by a change in zoning law.”²¹

If “there can be no vested rights” where “no work has been commenced, or where only preliminary work has been done without going ahead with the construction of the proposed building,” then in logic, the filing of a building permit—an act that must be done before any work is commenced—cannot alone give rise to vested rights.²²

Although the court tangentially acknowledged the fundamental differences between *Lutz* and *Knutson*, it did not recognize that these differences make it impossible and unnecessary to reconcile them. *Knutson* sets up a bright line test—if an application for a permit has been filed, the filer has a right to have the application reviewed under the law that existed at the time that the application was filed.²³ It is not necessary to delve into whether the developer has taken extra-governmental steps to develop its property, such as land acquisition, leasing, and financing. The question is simple and objective—is a permit application on file. *Lutz* used a very different bright-line test than *Knutson* because the parcel was unzoned and the developer did not have a permit to apply for. Because the *Lutz* court analyzed the case under the nonconforming use doctrine, the applicable bright line test asked whether a use existed at the time of the zoning change which would be in nonconformance to the zoning change. The *Lutz* court concluded that no use yet existed because no construction had yet begun; therefore, no rights in that existing use could have vested.²⁴ So when the court in *Pinnacle* wondered why the “land acquisition, demolition, and site preparation work in *Lutz* is not enough to establish a vested interest,” the answer is clear—the court in *Lutz* did not consider those factors at all.²⁵ It was simply interested in whether or not there was an existing use. That framework is completely inapplicable to *Knutson* and similar cases in which no construction could have possibly taken place because the developer had “merely” applied for a permit. But in attempting to reconcile these two cases, the *Pinnacle* court awkwardly tries to shoehorn *Knutson* into the nonconforming use framework. It will not fit because there are two separate, although confusingly interrelated, issues in the two cases.

The same principle runs through both cases—retroactive laws are unconstitutional if they destroy existing or vested rights. How does one “vest” a right in the development context? A person can have a vested right to consideration of a permit under the law in effect at the time that the application was filed. What if a permit is not required under the law when pre-development

21. *Id.* at 428.

22. *Id.* (quoting *Lutz v. New Albany City Plan Comm’n*, 101 N.E.2d 187, 190 (Ind. 1951)).

23. *Knutson v. State ex rel. Seberger*, 160 N.E.2d 200, 201 (Ind. 1959).

24. *Lutz*, 101 N.E.2d at 189.

25. *See id.* at 190.

begins, but the law changes such that a permit is required before actual construction begins? That is the unexpressed question at the heart of *Pinnacle*. As in *Lutz*, the developer in *Pinnacle* desired to develop unzoned land. When it undertook the primary steps of development, there was no requirement in place at the county level that it must acquire a building permit. Before construction began, that requirement was put into place. The fact that *Pinnacle* had to apply for the INDOT permits under a different regulatory scheme made it impossible to begin construction before the Amendment was enacted, but that is irrelevant to the application of *Knutson*. Under *Knutson*, the developer in *Pinnacle* would have no right to fix the application of the Marion County zoning ordinance in time simply because it had applied for a completely different permit. In the real world, development often requires a half dozen or more permits from different regulatory agencies. No Indiana appellate case stands for the proposition, nor does it stand to reason that the application for one of those permits freezes the law that can apply to the remainder.

If *Lutz* is directly on point and the INDOT permit applications are irrelevant, why did the *Pinnacle* court disturb the holding in *Knutson* at all? The court could have upheld *Knutson* with respect to zoned land in which permits are required and, with respect to unzoned land, adopted what it characterized as a “general proposition”—that a

developer acquires a “vested right[.]” such that a new ordinance does not apply retroactively if, but only if, the developer “(1) relying in good faith, (2) upon some act or omission of the government, (3) . . . has made substantial changes or otherwise committed himself to his substantial disadvantage prior to a zoning change.”²⁶

The position of developers post-*Pinnacle* is significantly riskier. Under what circumstances is a developer entitled to believe that it has a right to have his permit application considered under the law in effect at the time of the application? Clearly not with respect to a building or improvement location permit. What about an application for a subdivision plat? A stormwater drainage plan? A traffic plan? The public policy reasons for this bright line rule enunciated in *Knutson* are clear: “[a] government which exercises . . . police power over the property of its citizens without any fixed standards which are known to the citizens and the enforcing officials is government by men, and not by law.”²⁷

There is an inevitable tension between real estate developers and local governments because the development process takes time and significant resources can be invested in a project before dirt is turned. Developers (and their lenders) have a strong desire for certainty during this period that the rules that are in place at the beginning of the entitlement process will remain static through the

26. *Pinnacle Media*, 836 N.E.2d at 425-26 (quoting John J. Delaney & Emily J. Vaia, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 WASH. U. J. URB. & CONTEMP. L. 27, 31-35 (1996)).

27. *Knutson*, 160 N.E.2d at 202.

completion of construction. Local governments, on the other hand, understandably want the ability to revise zoning and other regulations as needed in order to exercise their police powers and maintain flexibility for changing circumstances. The vested rights doctrine, as expressed in *Knutson*, represented a bright line compromise. Uncertainty benefits neither the developer nor, ultimately, the community in which it wishes to invest.

At the time this Article went to press, the Indiana General Assembly had responded to *Pinnacle* by passing House Bill No. 1102-4 and Senate Bill No. 35. Both bills codify what the court stripped out of *Knutson*, namely, that a petitioner has the right to have his building permit considered under the law in place when the application was submitted. Although this legislative action resolves one of the key issues created by the court's ruling in *Pinnacle*, this case and its aftermath are illustrative of the reality that the common law and statutory rules that developers must follow in Indiana are in need of a comprehensive overhaul to bring consistency, predictability, and balancing of the rights of developers and the needs of local government.

B. Consideration of Statutory Factors in Re-Zoning Petitions

In *Borsuk v. Town of St. John*,²⁸ the western half of the parcel that Borsuk owned in Lake County was zoned as residential, and a residence was located on this portion, while the eastern half of Borsuk's property was zoned commercial. Borsuk petitioned the St. John Plan Commission (the "Commission") in 2000 to have the entire parcel zoned commercial, in the hope of later building a gas station on the property. All other lots on the block in which Borsuk's property was located were zoned commercial, and the Commission's comprehensive zoning plan (the "Plan") anticipated that the entire tract would ultimately be rezoned commercial. The Commission denied Borsuk's request after a large group of remonstrators expressed their concerns that a gas station on Borsuk's property would exacerbate existing problems with heavy traffic congestion and create dangers for residential neighborhoods and an elementary school in the area. Borsuk filed suit, contending that the Commission's decision was arbitrary and capricious.²⁹ The Indiana Supreme Court found, per the Indiana Code ("Code"), that a municipality is permitted to create a planning commission to create comprehensive zoning plans that may be used to help guide the municipality when faced with land use and development issues.³⁰ When considering how to zone a tract, the Code requires a "plan[ning] commission and the legislative body [of the municipality] to 'pay reasonable regard to' the comprehensive plan . . . current structures and uses, the most desirable use for the land," as well as the impact of zoning on property values.³¹ The Indiana Court of Appeals, in its decision of this case below, held that the statute required a

28. 820 N.E.2d 118 (Ind. 2005).

29. *Id.* at 120.

30. *Id.* at 121 (citing IND. CODE § 36-7-4-502 (2005)).

31. *Id.* at 122 (citing IND. CODE § 36-7-4-603).

municipality to follow the comprehensive plan unless the planning commission could show a compelling reason to deviate from the plan.³² The supreme court rejected the lower court's reasoning, holding that the testimony from the remonstrators with regard to their concerns about traffic and safety issues demonstrated that the Commission did pay reasonable regard to the statutory factors, and therefore the Commission's decision was found not to be arbitrary or capricious.³³

C. Effect of Recording a PUD

The Indiana Supreme Court also examined the issue of the enforceability of conditions imposed in connection with a Planned Unit Development ("PUD") against a subsequent purchaser of property subject to the PUD in *Story Bed & Breakfast, LLP v. Brown County Area Plan Commission*.³⁴ Story Group, Inc., a prior owner of the twenty-two acre property at issue in this case, petitioned the Brown County Plan Commission ("Plan Commission") in 1986 to designate a seven acre tract as a PUD so that Story Group, Inc. could construct and operate a bed and breakfast on the tract. The Plan Commission granted primary approval of the PUD "subject to the following conditions: See list of covenants attached."³⁵ The attached list of covenants provided that no loud speakers, excess lighting, or overnight camping were permitted on the seven acre tract.³⁶ In 1992, the entire twenty-two acres were included in the PUD, again subject to the covenants approved by the Plan Commission in 1986.³⁷ Although the Plan Commission's conditions for approval of the PUD were never recorded, they were at all times available for public inspection.³⁸ The property was transferred to Story Bed & Breakfast, LLP ("Story") in 1999, and evidence presented to the trial court showed that before the property was conveyed, Story was aware that the property was designated a PUD. Story, however, was not aware of the specific PUD restrictions at that time and never contacted the Plan Commission regarding the restrictions or otherwise made any attempt to discover them. Story converted a mill on the property to a bar and grill and invested over \$100,000 in remodeling and repairs.³⁹ The property was used by Story for several events that drew thousands of patrons and included loud outdoor concerts and overnight camping. In late 1999, the Plan Commission sent Story a copy of the PUD covenants and notified Story that it intended to enforce the PUD restrictions.⁴⁰

32. *Id.* at 120-21 (citing *Borsuk v. Town of St. John*, 800 N.E.2d 217, 223 (Ind. Ct. App. 2003), *vacated*, 820 N.E.2d 118 (Ind. 2005)).

33. *Id.* at 122.

34. 819 N.E.2d 55 (Ind. 2004).

35. *Id.* at 57.

36. *Id.*

37. *Id.*

38. *Id.* at 59.

39. *Id.*

40. *Id.* at 58-59.

Story filed suit in 2001 seeking a preliminary injunction to prevent the Plan Commission from enforcing the PUD conditions.⁴¹

The Indiana Code permits a planning commission to establish conditions or compel a property owner to make commitments when approving a PUD.⁴² Although the Code does not define these terms, the court concluded that “commitments” are submitted by the land owner to persuade a planning commission to approve a zoning variance or PUD. The Code requires commitments to be recorded in order for them to be effective against a subsequent purchaser.⁴³ “Conditions,” however, are restrictions imposed by a legislative body and are not required to be recorded to be enforceable against a future property owner.⁴⁴ The trial court found that although some of the PUD restrictions were characterized as directives, or conditions, others were written as agreements between the developer and the Plan Commission, and thus the trial court classified them as commitments.⁴⁵ When it examined this issue in the case below, the court of appeals held that the terms “conditions” and “commitments” as used in the statutes were too difficult to distinguish, and instead focused on the issue of whether or not Story had sufficient notice of the PUD requirements. Because the PUD restrictions were not recorded, the court of appeals found that Story did not have sufficient notice and therefore was not subject to the PUD restrictions.⁴⁶

The majority of the Plan Commission’s “covenants” on which the PUD approval was based were written as directives, and as such were considered by the Plan Commission to be conditions for purposes of the Code.⁴⁷ The supreme court determined that “the legislative distinction between commitments and conditions must be given effect” even though their definitions are “murky” because the terms have been given meaning in practice.⁴⁸ Because the Code provides that “conditions imposed on the granting of an exception, a use, or a variance are not subject to the rules applicable to commitments[,]”⁴⁹ conditions attached to the approval of a PUD are not required to be recorded to be enforceable against a subsequent property owner, as long as they are publicly available.⁵⁰ Finding that conditions put in place when a PUD is approved are akin to zoning ordinances, the court reasoned that conditions are enforceable against the public at large, provided that they are available for public

41. *Id.* at 59.

42. IND. CODE § 36-7-4-1512 (2005).

43. *Story Bed & Breakfast*, 819 N.E.2d at 62; *see also* IND. CODE §§ 36-7-4-1512(b)(2), -615(c).

44. *Id.* at 62; *see also* IND. CODE § 36-7-4-921(e).

45. *Id.* at 59.

46. *Id.* at 59-60 (citing *Story Bed & Breakfast, LLP v. Brown County Area Plan Comm’n*, 789 N.E.2d 13, 17-18 (Ind. Ct. App. 2003), *vacated*, 819 N.E.2d 55 (Ind. 2004)).

47. *Id.* at 63.

48. *Id.* at 62.

49. *Id.* at 61-62 (citing IND. CODE § 36-7-4-921(e)).

50. *Id.* at 64.

inspection.⁵¹ A subsequent property owner such as Story, therefore, has the burden to investigate what conditions are connected to a PUD.⁵² Because the PUD conditions in *Story* were publicly available, the court also found that Story was a bona fide purchaser without notice of the unrecorded restrictions in the PUD, because Story had actual knowledge that the property was subject to a PUD when it purchased the property, which put it on inquiry notice that unrecorded conditions may be attached.⁵³

II. REAL ESTATE CONTRACTS

A. *Enforcement of Commercial Exclusive Use Provisions*

The Indiana Supreme Court, in a three to two decision, overturned a ruling of the Indiana Court of Appeals in *Tippecanoe Associates II, LLC v. Kimco Lafayette 671, Inc.*⁵⁴ The central issue in the case concerned the enforcement of a provision in a shopping center lease which prohibited the landlord from leasing space in the shopping center to another grocery store user. The supreme court refused to enforce the provision solely because the tenant in whose favor the restriction ran was not then operating a grocery store in the shopping center.⁵⁵ The court of appeals would have enforced the restriction when it reversed the trial court, which had determined that there was a sufficient change in circumstances to warrant its refusal to enforce the covenant.⁵⁶ The facts in this case are fairly straightforward.

In 1973, Kimco's predecessor-in-interest owned some land in Lafayette, Indiana, and desired to develop the land by building a shopping center which it called the Sagamore Center. The landlord reached an agreement with Kroger to lease a portion of the Sagamore Center. That lease contained an initial term of twenty years and granted the grocery store tenant four options to extend the term for five years each.⁵⁷ The lease contained the following restriction in favor of the tenant:

Landlord covenants and agrees, from and after the decree hereof and for so long as this lease shall be in effect, not to lease, rent, occupy, or suffer or permit to be occupied, any part of the Shopping Center premises or any other premises owned or controlled directly or indirectly either by Landlord, its successors, heirs or assigns, or Landlord's principal owners, stockholders, directors, or officers, or their assignees (hereinafter called owners) which are within 2 miles of the Shopping

51. *Id.*

52. *Id.* at 62.

53. *Id.* at 64-65.

54. 829 N.E.2d 512 (Ind. 2005).

55. *Id.* at 514-15.

56. *Tippecanoe Assocs. II, LLC v. Kimco Lafayette 671, Inc.*, 811 N.E.2d 438, 449 (Ind. Ct. App. 2004), *vacated in part*, 829 N.E.2d 512 (Ind. 2005).

57. *Tippecanoe*, 829 N.E.2d at 513.

Center premises for the purpose of conducting therein or for the use as a food store or a food department or for the storage or sale for off-premises consumption of groceries, meats, produce, dairy products, or bakery products, or any of them; and further, that if Landlord or owners own any land, or hereinafter during the term of this lease Landlord or Owners acquire any land within such distance of the Shopping Center, neither will convey the same without imposing thereon a restriction to secure compliance with the terms of this lease. . . . This covenant shall run with the land. Landlord acknowledges that in the event of any breach hereof Tenant's remedies at law would be inadequate and therefore, in such event, Tenant shall be entitled to cancel this lease or to relief by injunction, or otherwise, at Tenant's option, and Tenant's remedies shall be cumulative rather than exclusive.⁵⁸

Kroger operated in the shopping center for approximately ten years when it sold all of its three Tippecanoe County stores to entities affiliated with Pay Less Supermarkets, which "at the time operated two other grocery stores within two miles of the Sagamore Center."⁵⁹ Pay Less never actually operated a grocery store in the Sagamore Center, but approximately one year after it had acquired the lease, subleased the location to H.H. Gregg, an appliance store operator, who appears to remain open at the location now.⁶⁰ There is no indication that Pay Less has failed to pay any rent due on the space or that there is any default on the part of Pay Less under the lease.

Naturally, the Sagamore Center had other tenants too. One of those other tenants was Target Corporation who operated its store in the Sagamore Center until 2000 when it closed the store and left Kimco, who had acquired the Sagamore Center in 1997, with roughly one-half of the shopping center vacant. Kimco searched far and wide for a new tenant like Target, but the only potential tenant it could find who was interested in leasing space in the Sagamore Center was a grocery store operator based in Missouri.⁶¹ Anxious to sign a lease with someone and earn some return on its investment in the Sagamore Center, Kimco filed an action to obtain a declaratory judgment that the prohibition on leases to other grocery store operators was unenforceable.⁶²

Initially, Kimco's strategy seemed successful, as the trial court refused to enforce the covenant on the basis that "the use of the property and the surrounding area have changed so radically"⁶³ that the initial intent and purpose of the restriction were no longer served. The trial court cited three facts that constituted this radical change: first, that the tenant was not operating as a grocery store; second, that the tenant's subtenant would not be harmed by a

58. *Tippecanoe*, 811 N.E.2d at 442-43.

59. *Tippecanoe*, 829 N.E.2d at 513.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Tippecanoe*, 811 N.E.2d at 447.

grocery store operating in the center; and third, that Target, a major anchor tenant, had closed.⁶⁴ Unfortunately for Kimco, the court of appeals scrutinized the trial court's reasoning and concluded that the changes in circumstances noted by the trial court were not sufficient under prior case law to justify any refusal to enforce an unambiguous restriction.⁶⁵

The supreme court accepted transfer of this case and vacated the opinion of the court of appeals as it related to the enforceability of the restrictive covenant. The supreme court first set forth the general rule that restrictive covenants are permissible but that they are "disfavored and justified only to the extent they are unambiguous and enforcement is not adverse to public policy."⁶⁶ The court further stated that restrictive covenants in leases that prevent competition are routinely enforced and set out many of the economic reasons justifying such restrictions, such as the protection of investments made in the shopping center by both the landlord and the tenant.⁶⁷ But, the court noted, these reasons "support limiting the covenant to the protection of current tenants of the center."⁶⁸ Accordingly, if the covenant no longer protects current tenants of the center, then it would seem that the covenant becomes an undue restraint of trade and, perhaps, unenforceable.⁶⁹

The supreme court stated that the court of appeals's discussion of changes in circumstances was unnecessary as "there is only one factor that is central and dispositive here. Because the Kroger site in the Sagamore Center is no longer being used as a grocery store location, there is no interest within the center for the restrictive covenant to protect."⁷⁰ There is no dispute that if Pay Less had continued grocery store operations at the center, this restrictive covenant would be enforceable, and the supreme court stated as much.⁷¹ However, when Pay Less assumed the lease and elected not to operate as a grocery store, that election "severed the restrictive covenant from the occupancy."⁷² Once this severance occurs, the covenant loses its enforceability. The dissenting opinion challenges the majority on this point by stating "[t]his rewrites existing commercial leases and restrains the ability of parties in the future to enter them on terms they view to be mutually beneficial, regardless of whether there is any demonstrable adverse effect on competition."⁷³

The court's willingness to intrude upon the parties' freedom to contract indeed seems troubling. Clearly, if the parties had intended the restriction to lapse upon the cessation of the operation of a grocery store in the leased

64. *Id.*

65. *Id.* at 447-49.

66. *Tippecanoe*, 829 N.E.2d at 514.

67. *Id.*

68. *Id.*

69. *See id.* at 515-16.

70. *Id.* at 514-15.

71. *Id.* at 515.

72. *Id.*

73. *Id.* at 517 (Sullivan, J., dissenting).

premises, they could have plainly stated as much in the lease document. That the lease did not so provide could be an indication that the parties considered such a notion and agreed not to address it, thus leaving the covenant intact following such cessation; in which case, the court's decision would fail to embrace the parties' intentions. Of course, the parties may not have considered this possibility while negotiating the lease and, thus, its omission does not provide any evidence of the intent of the parties. However, under the supreme court's holding, the intent of the parties does not appear to be the guiding consideration.

The majority opinion of the supreme court favorably cited the Restatement (Second) of Contracts regarding covenants in restraint of trade, which, in its comments,⁷⁴ discusses two situations where such a restraint may be unreasonable. "The first occurs when the restraint is greater than necessary to protect the legitimate interests of the promisee."⁷⁵ In this case, the court deemed it necessary to "narrow" the "protected activity" of the tenant in order to determine the reasonableness of the covenant. In holding as it does, the court seemed to be requiring that in order to establish an enforceable restrictive covenant in favor of a tenant in a lease of real property, the covenant must protect some aspect of the tenant's occupancy at the property. Accordingly, one must wonder whether, following this opinion, a landowner could enter into an enforceable agreement to restrict his or her land in favor of a third party to protect some interest of such party outside of such land. Conservation easements, historical preservation easements and, indeed, any easement in gross would seem to fit within this framework.

The second situation discussed by the comments in the Restatement is where the "hardship to the promisor and the likely injury to the public"⁷⁶ outweigh any benefit in enforcement accruing to the promisee. The court here found that both the "convenience to the public and certainly the interest of the landlord are served by having a grocery store in the center."⁷⁷ These interests, when balanced against the interest of "someone foreign to the center who simply acquires the right to exclude competition without making any investment in the center[,] "⁷⁸ are too strong for the court to enforce the restrictive covenant and exclude the competition. The dissent criticized the majority opinion on this point as well because there were no findings by the trial court "as to the degree of competition among grocery stores in the Lafayette market."⁷⁹

The supreme court seemed to be charting new territory with its holding that a restrictive covenant becomes unenforceable when it is severed from the occupancy of the tenant. The parameters of this principle will undoubtedly be defined and refined as cases arise. Many questions arise. For example, at what

74. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. a (1981).

75. *Tippecanoe*, 829 N.E.2d at 515 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. a (1981)).

76. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. a (1981)).

77. *Id.* at 516.

78. *Id.* at 515.

79. *Id.* at 517 (Sullivan, J., dissenting).

point does the restrictive covenant become severed? One can imagine a tenant whose business in the leased premises changes over time so that what was at the beginning of the lease term the tenant's primary business and the business covered by a restrictive covenant, now represents only a fraction of the tenant's business. Would the landlord be justified in leasing space in the center to another occupant to engage in that initial use? Also, if the tenant ceases operating for a time and later reopens for the initial, protected use, does the prior severance cut off the enforceability of the covenant for all time or can it be revived by that subsequent re-opening?

Another example is suggested by the covenant in this case. The covenant prohibited the landlord from leasing any property it acquired after the lease was executed within two miles of the Sagamore Center for use as a grocery store. If Pay Less had operated a grocery store in the Sagamore Center, would the covenant as applied to this extended area not be "severed" from Pay Less's occupancy because Pay Less has no interest in and is not operating in that other center? Also, as an operating grocery store, would Pay Less's interest in Sagamore Center be sufficient to justify the prohibition imposed on other centers in a two-mile radius, or would the hardship on the landlord or the public injury in such lack of competition outweigh the benefit to the tenant?

B. Forfeiture Provisions in Land Sale Contracts

Morris McLemore ("Morris") owned a parcel of land in Osceola.⁸⁰ In 1998, Morris entered into a conditional land sales contract to sell the parcel to his nephew Brian McLemore ("Brian"). The contract called for a purchase price of \$185,000 with a down payment of \$25,000 and monthly payments of \$1545.21, with interest at ten percent per annum. The contract included a provision which called for forfeiture unless Brian had paid a "substantial amount" of the purchase price at the time of default:

The rights of the Purchaser shall terminate and all payments heretofore made shall remain the property of the Seller as rent for the use of the premises and as liquidated damages, and the Purchaser shall immediately surrender possession to Seller. Provided, however, that if the Purchaser has paid a "substantial amount" on the principal purchase price, the provisions of this section shall not apply and the Seller may pursue such other remedies as herein provided or permitted by Indiana Law. It is stipulated and agreed by the parties that the Purchaser shall have paid a "substantial amount" of the purchase price when the fair market value of the real estate at the time of default exceeds the sum of (a) the then remaining unpaid balance of the purchase price with accrued interest thereon, (b) the estimated cost of resale, (c) the amount of any additional liens on the real estate, and (d) reasonable attorney fees of the enforcement of this contract[.]⁸¹

80. McLemore v. McLemore, 827 N.E.2d 1135, 1138 (Ind. Ct. App. 2005).

81. *Id.* at 1138-39 (alteration in original).

Brian made monthly payments for approximately three years. In September 2001, things went sour between Morris and Brian. Morris went to the property to collect a late payment and words were exchanged. Shortly thereafter, Morris changed the locks at the property and Brian sent a letter to the property tenants, instructing them to send their rent checks to Morris. Brian then filed a complaint against Morris, alleging constructive fraud, wrongful forfeiture, breach of contract, and conversion. The trial court found the land contract to be forfeited. Brian appealed.⁸²

The court first stated that forfeitures are generally disfavored at law and that “[t]he court, in the exercise of its equitable powers, does not infringe upon the rights of citizens to freely contract, but the court [may] refuse, upon equitable grounds, to enforce the contract because of the actual circumstances at the time the court is called upon to enforce it.”⁸³ The appropriate test, taken from *Morris v. Weigle*,⁸⁴ is that “[f]orfeiture may be considered an appropriate remedy only in the limited circumstances of: (1) an abandoning or absconding vendee or (2) where the vendee has paid a minimal amount and the vendor’s security interest in the property has been jeopardized by the acts or omissions of the vendee.”⁸⁵

The court rejected the contract’s attempt to define a “minimal amount” and noted that it had previously rejected similar contract provisions.⁸⁶ The court noted that Brian had paid 18.2% of the purchase price and concluded that under the facts and circumstances, Brian had made more than the required “minimal payment.”⁸⁷

McLemore v. McLemore is interesting to those observers of Indiana jurisprudence concerned with the remedies available under real estate contracts because it illustrates that the cherished principle of freedom to contract can sometimes be abrogated in order to enforce equity, as the court perceives it. Although the court stated that “[f]orfeiture provisions in a land sales contract are not per se to be deemed unenforceable,”⁸⁸ it gave little hope that such provisions could be held to be enforceable in any but the most extreme set of facts. The court’s analysis in this case should certainly dissuade parties to a land sale contract from drafting a forfeiture remedy provision, or at least from attempting to enforce one.

82. *Id.* at 1139.

83. *Id.* at 1140 (quoting *Morris v. Weigle*, 383 N.E.2d 341, 344 (1978)).

84. 383 N.E.2d 341.

85. *McLemore*, 827 N.E.2d at 1140 (citing *Morris*, 383 N.E.2d at 344).

86. *Id.* at 1142; *see, e.g.*, *Parker v. Camp*, 656 N.E.2d 882 (Ind. Ct. App. 1995) (rejecting definition of “substantial equity” as seventy-five percent of the purchase price); *Johnson v. Rutoskey*, 472 N.E.2d 620, 620 (Ind. Ct. App. 1984) (rejecting contract provision requiring \$12,000 payment on a purchase price of \$52,000 as the “minimal equity threshold”).

87. *McLemore*, 827 N.E.2d at 1142.

88. *Id.* at 1140.

C. Reformation of Deeds

In *Wright v. Sampson*,⁸⁹ the Indiana Court of Appeals addressed when a deed may be reformed for unilateral mistake. The property at issue in this case was a twenty-five acre tract in Miami County owned by Ray Wright (“Ray”).⁹⁰ A junkyard business operated by both Ray and his son, Roger Wright (“Wright”), was located on the eastern portion of the property. Rebecca Sampson (“Sampson”), Ray’s daughter, owned property adjoining Ray’s at the western border of the twenty-five acre tract. Ray intended to convey to Sampson, as a gift, the western half of his property, and therefore executed a deed prepared by counsel in May 1997 for that purpose. Sampson immediately recorded the deed. Unbeknownst to Ray, the deed given to Sampson included an incorrect legal description of the property, and thereby the entire twenty-five acres was conveyed to Sampson. Before his attorney informed him of the error, Ray executed a second deed and gave it to Wright in September 1997, intending to convey to his son a gift of the eastern half of his property.⁹¹ Wright also recorded his deed the day it was delivered to him. The legal description contained in Wright’s deed, however, not only described the western half and not the intended eastern half of the property, but also property that had already been conveyed to Sampson in the first of the deeds Ray executed. Neither Sampson nor Wright paid any consideration for their respective deeds. When the error was discovered, Wright asked Sampson to sign several documents prepared by counsel in order to correct both deeds. Sampson, however, refused to sign, and in June 2001, filed suit to quiet title to all twenty-five acres that were conveyed to her in the first deed.⁹² Wright counterclaimed to have both deeds reformed to carry out the conveyances as Ray had intended. The trial court held that title to the entire twenty-five acres should be quieted in Sampson, and found that there was no mutual mistake and therefore reformation was not an appropriate remedy.⁹³

First, the court addressed Sampson’s challenge to Wright’s standing to bring an action for reformation because Wright was not the grantor for either deed.⁹⁴ The court of appeals concluded that Wright did have standing to request reformation of his deed because he was a party to that deed, and that he could also seek reformation of Sampson’s deed because Wright was in privity with Ray, a party to Sampson’s deed.⁹⁵ Second, the court addressed when a court could offer the remedy of reformation based on mistake. The court acknowledged that Indiana common law generally does not allow for reformation of a deed unless the petitioning party is able to show, by clear and convincing

89. 830 N.E.2d 1022 (Ind. Ct. App. 2005).

90. *Id.* at 1024.

91. *Id.*

92. *Id.* at 1024-25.

93. *Id.* at 1025.

94. *Id.* at 1026.

95. *Id.* at 1026-27.

evidence, that there was mutual mistake or fraud.⁹⁶ Distinguishing *Wright* from that precedent, the court of appeals found jurisprudence from other states persuasive and held that when a deed is conveyed as a gift, it may be reformed if the party seeking reformation can prove a unilateral mistake by clear and convincing evidence.⁹⁷ The court reasoned that a deed conveyed as a gift was not a typical contractual relationship with mutual obligations, and because a gift is unilateral in nature, “only a unilateral mistake can occur.”⁹⁸ However, although a deed given as a gift may be reformed due to mistake if requested by the grantor, the same remedy generally has not been available at common law if requested by a grantee.⁹⁹ The *Wright* case, however, was again considered distinguishable from this principle, and the court held that reformation is available when it is sought by a grantee against another grantee.¹⁰⁰ As in the instant case where Wright was able to prove by clear and convincing evidence that there was unilateral mistake, the court held that a deed given as a gift may be reformed.¹⁰¹

In *Patterson v. Seavoy*,¹⁰² the Indiana Court of Appeals decided a matter of first impression regarding the ability of a grantee of an unrecorded deed to sue for damages as a real party in interest.¹⁰³ Patterson conveyed a parcel of real estate in Bloomington to Bradley via warranty deed in 1993, and recorded that deed. Almost four years later, Bradley re-conveyed the same property back to Patter by executing a second warranty deed, but did not record it for several years (the “Second Deed”). After the Second Deed had been delivered to Patterson, but before it was recorded, a tree on Seavoy’s property fell onto the house located on Patterson’s property during a thunderstorm. Patterson filed a claim against Seavoy seeking damages for Seavoy’s alleged negligence in maintaining the tree, and Seavoy filed a motion for summary judgment asserting that Patterson was not a real party in interest. After the trial court granted summary judgment to Seavoy, Patterson recorded the Second Deed and filed an appeal.¹⁰⁴

Seavoy argued that Bradley was the owner of record until the Second Deed was recorded, and therefore Patterson did not prove ownership of the damaged property.¹⁰⁵ As such, Seavoy contended, because Patterson could not prove that he owned the property that the tree damaged, he was not the true owner of the right to seek such damages, and therefore was not a real party in interest pursuant to Indiana Trial Rule 17(A).¹⁰⁶ The *Patterson* court held that “for a valid transfer of legal title, the grantor must make, execute, and deliver a deed to the grantee

96. *Id.* at 1027.

97. *Id.* at 1027-28.

98. *Id.* at 1027 (citing *Schulz v. Miller*, 837 P.2d 71, 76 (Wyo. 1992)).

99. *Id.* at 1028.

100. *Id.* at 1029 (citing *Simms v. Simms*, 249 N.Y.S. 171, 174 (N.Y. Sup. Ct. 1931)).

101. *Id.*

102. 822 N.E.2d 206, 210 (Ind. Ct. App. 2005).

103. *Id.* at 209.

104. *Id.*

105. *Id.* at 211.

106. *Id.* at 210.

containing words of conveyance and describing the property and the interest to be conveyed.”¹⁰⁷ The court therefore concluded that although record title is evidence of ownership and gives notice of such ownership, recording a deed has no effect on the instrument’s validity and therefore Patterson was a real party in interest who could seek damages from Seavoy.¹⁰⁸

III. LANDLORD/TENANT LAW

A. Residential Real Estate Disclosures

The court of appeals addressed again this year a dispute concerning the effect of statements made by a seller of residential real estate in the required sales disclosure form.¹⁰⁹ In *Reum v. Mercer*,¹¹⁰ Reum purchased a home in 1990 and leased it to her granddaughter. In 1996 the occupants noted a problem with the septic system of the property that was then repaired by the tenant. After that repair, the occupants had no further problems with the septic system.¹¹¹ In 2001, Reum sold the home to Mercer and, as required by law, completed and delivered to Mercer a disclosure form which indicated the septic system was not defective.¹¹² Mercer was informed by a neighbor nearly one year after the sale that sewage from Mercer’s home was being discharged onto the neighbor’s property. After spending over fourteen thousand dollars to repair the septic system, Mercer brought suit alleging fraud, constructive fraud, and breach of warranties.¹¹³

The trial court found in favor of Mercer finding that “[t]he law in Indiana is clear, that if a seller sells real estate with knowledge of its defects and those defects are not disclosed to the purchaser then seller is liable to the buyer for the correcting of those defects.”¹¹⁴ The trial court determined that it is not reasonable for a buyer to inspect a home’s septic system because to do so would require the home’s yard to be dug up. The trial court did note that the statute requiring the disclosure statement provides that the seller is not liable for errors in the disclosure statement if the seller, in making those statements, has relied on the opinion of an expert.¹¹⁵ Here, however, the trial court found no justified

107. *Id.* (citing IND. CODE § 32-17-1-2 (2005); *id.* § 32-21-1-15).

108. *Id.* at 211.

109. See generally Tanya D. Marsh & Robert G. Solloway, *Let the Seller Beware: The Slow Demise of Caveat Emptor in Real Property Transactions and Other Recent Developments in Indiana Real Property Law*, 38 IND. L. REV. 1317 (2005) (discussing certain recent case law having the effect of imposing upon sellers of residential real estate liability for false, misleading, incomplete, or incorrect information contained in the required forms).

110. 817 N.E.2d 1267 (Ind. Ct. App. 2004).

111. *Id.* at 1268.

112. *Id.* at 1269.

113. *Id.*

114. *Id.* at 1270.

115. *Id.* at 1273 (citing IND. CODE § 32-21-5-11 (2004)).

reliance on the statements or opinion of an expert because the seller relied on the statements of the tenant, admittedly not an expert, that the septic problem was repaired in 1996 and thereafter did not present a problem.

The court of appeals reversed the trial court on the basis that the seller did not have any knowledge of an existing defect in the septic system at the time she signed the disclosure statement.¹¹⁶ After the 1996 repair, there was no evidence of any defect at all in the system until nearly one year after the sale of the property to Mercer.¹¹⁷ Accordingly, the seller, not knowing of any defect, cannot be required to seek the advice and opinion of an expert in septic systems in order to avail herself of the disclosure statute's exception for reliance on the opinion of an expert.¹¹⁸ The court of appeals rejected the notion required by the trial court that a seller must disclose any defect in the home that was ever repaired by someone other than an expert.¹¹⁹ Indiana law simply does not require such disclosure but only requires the seller to "disclose existing defects of which she has actual knowledge at the time of the disclosure."¹²⁰

The court of appeals decision is a welcome addition to this often confusing and developing body of law regarding the obligations of a casual seller of residential real estate for disclosing defects in that real estate. Although the law is clearly moving away from the traditional notions of caveat emptor, this case clarifies that the law does not place liability on the seller for every problem and defect in the home. However, the decision of the trial court seems to highlight the confusion that may exist in our collective understanding of the effect of the disclosure statute. The disclosure statute was not intended to provide any warranty by the seller regarding the condition of the home, but to encourage disclosure of existing, known problems in the home that otherwise would not be discovered by the buyer's inspections.

B. Residential Lease Security Deposit

The court of appeals case of *Hill v. Davis*¹²¹ serves as a reminder to landlords under leases for residential property to be ever vigilant regarding the statutory notice requirements¹²² for the return of tenants' security deposits upon termination or expiration of the lease. In this case, the Hills leased a home in Coatesville, Indiana, under a lease for one year and paid a \$500 security deposit.¹²³ The following May, the tenants sent the landlord a notice that they were dissatisfied with the premises and would be vacating in approximately one

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 1274.

120. *Id.*

121. 832 N.E.2d 544 (Ind. Ct. App. 2005).

122. IND. CODE § 32-31-3 (2005).

123. *Hill*, 832 N.E.2d at 545.

month's time.¹²⁴ Before the tenants moved out, the landlord filed a small claims action for breach of the lease and claimed damages due for unpaid rent and utility bills.¹²⁵ The tenants then moved out and did not leave a forwarding address with the landlord because they were homeless.¹²⁶ During the hearing on the small claims action at which the tenants requested an enlargement of time to engage counsel, the court inquired as to where the tenants were then living and where they were receiving mail.¹²⁷ Tenants supplied an address, which the court noted in its chronological case summary and which the court then mailed to the landlord's attorney and to the tenants.¹²⁸

At a subsequent hearing on the merits, the small claims court entered judgment for the landlord, and the tenant appealed.¹²⁹ On appeal, the tenants claimed that the judgment was erroneous because the landlord had not supplied the tenants with an itemized list of damages within forty-five days after receiving the tenants' forwarding address as required by the security deposit statute.¹³⁰ Accordingly, the landlord had to return the tenants' security deposit in full, along with attorneys' fees incurred in responding to the landlord's action.¹³¹ The court of appeals agreed and held the tenants were entitled to the return of their security deposit, plus attorneys' fees.¹³² The landlord received adequate notice of the tenants' forwarding address when the tenants stated in open court what the address was and when the court forwarded to the landlord's attorney the chronological case summary which included that information.¹³³ The landlord's attorney was engaged specifically to represent the landlord in connection with the lease matter and, therefore, delivery of the forwarding address to the attorney was deemed sufficient to put the landlord on notice of that address.¹³⁴ Once a landlord has a tenant's forwarding address, the statute clearly and without exception provides that the landlord must send the tenant an itemized list of damages due under the lease.¹³⁵

The landlord argued that the small claims compliant served upon the tenants fulfilled the requirements of the statute to provide such itemized list of damages.¹³⁶ The landlord's complaint stated that the tenants were "in breach of a lease due to unpaid rent and utility bills. The damage deposit should be applied

124. *Id.*

125. *Id.* at 545-46.

126. *Id.* at 546.

127. *Id.*

128. *Id.* at 545-46.

129. *Id.* at 546-47.

130. *Id.* at 549-50.

131. *Id.*

132. *Id.* at 555.

133. *Id.* at 551-52.

134. *Id.* at 551.

135. IND. CODE § 32-31-3-12 (2005).

136. *Hill*, 832 N.E.2d at 552.

toward any judgment rendered herein.”¹³⁷ The court of appeals found that summary description of damages to be lacking and specifically noted that

[w]e cannot say that the purpose of the security deposit statute’s itemized damages notice requirement, which is to inform the tenant of why the landlord is keeping the security deposit and providing the tenant an opportunity to challenge the costs, has been met where the landlord merely provides a lump sum request for claimed damages in an alias notice of claim filed in small claims court.¹³⁸

The effect upon the landlord’s claim for damages when the landlord fails to comply with the statute is severe indeed. As the court of appeals stated, that failure “constitutes an agreement that no damages are due and requires that she return the \$500 security deposit to Tenants as well as pay Tenants’ attorney fees and costs.”¹³⁹ Therefore, instead of a judgment in the landlord’s favor of over \$3000 for unpaid rent under the lease, landlord loses that claim and instead is obligated to return \$500 to the tenant and pay the tenant’s attorneys fees and costs.

C. Extent of Landlord’s Rights in Common Areas

In a matter of first impression, the court of appeals has held that an apartment complex landlord has exclusive possession of the common areas of its apartment complex.¹⁴⁰ This case was brought by ninety-six apartment complexes in central Indiana against the publisher of a free weekly paper, *The Renter’s Gazette*, whose ostensible aim appeared to be finding first time home buyers.¹⁴¹ Between 25,000 and 50,000 copies of *The Renter’s Gazette* are published each week and distributed free of charge directly to the doorstep of each apartment in each of the targeted apartment communities. The apartment complex owners objected to this distribution scheme as it tended to cause excess litter in the common area that maintenance staff for the complex had to remove and which detracted from the curb appeal of the apartment communities.¹⁴² The apartment complex owners had requested on a number of occasions that the publisher cease distributing the paper at their communities.¹⁴³ The publisher, naturally, has refused their requests and continued to distribute the paper on a weekly basis.¹⁴⁴ The apartment complex owners brought an action seeking an injunction against the publisher of the paper to prohibit the publisher’s distributors from entering the apartment

137. *Id.*

138. *Id.* at 553.

139. *Id.* at 555.

140. *Aberdeen Apartments v. Cary Campbell Realty Alliance, Inc.*, 820 N.E.2d 158, 165 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 178 (Ind. 2005).

141. *Id.* at 161-62.

142. *Id.* at 162-63.

143. *Id.* at 162.

144. *Id.*

complexes to distribute the paper.¹⁴⁵

The trial court refused to grant a preliminary injunction, finding that the apartment complex owners were unlikely to prevail on the merits.¹⁴⁶ The trial court found specifically that upon leasing the apartments in the complex, the landlord lacked exclusive possession of the common areas of the complex necessary to maintain an action for trespass.¹⁴⁷ The court of appeals analyzed applicable case law and determined that there is an ambiguity in the case law as to whether an aggrieved party must have exclusive possession of the premises in order to maintain an action for trespass upon those premises.¹⁴⁸ However, the court of appeals did not attempt to resolve this ambiguity, holding instead that, as a matter of law, the apartment complex owners had exclusive possession of the common areas of the apartment complex.¹⁴⁹ The court compared approaches to the question as set forth in a decision by the Michigan Court of Appeals,¹⁵⁰ which held that the landlord retained exclusive possession of the common areas and the tenants were granted licenses to use the common areas as an appurtenance of their leased premises,¹⁵¹ and by the Supreme Court of Washington,¹⁵² which found that authority in the common areas was common to both the landlord and tenant,¹⁵³ and found the Michigan approach to be the better approach.¹⁵⁴ The Washington approach leaves the parties in a position that no party can maintain an action for trespass upon the common areas because no party has exclusive possession of the common areas.¹⁵⁵

Judge Baker filed a dissenting opinion in this case challenging the majority on this matter. He would instead have held that the landlord retained a possessory interest in the common areas sufficient to maintain and repair them, but would not extend the possessory interest of the landlord beyond that.¹⁵⁶ Judge Baker argued that granting or confirming that the landlord has exclusive possession of the common areas would give the landlord “the right to bar anyone of its choosing—not just solicitors—from the premises.”¹⁵⁷ Although a tenant may agree to such a provision in the tenant’s lease, it is unwise, in his opinion, to read it into the lease. The majority responded to this criticism by stating that the license granted to the tenants protected them from arbitrary action by the landlord in excluding potential guests and invitees generally and that arbitrary

145. *Id.* at 163.

146. *Id.* at 164.

147. *Id.*

148. *Id.* at 164-65.

149. *Id.* at 165.

150. *Stanley v. Town Square Coop.*, 512 N.W.2d 51, 54 (Mich. Ct. App. 1994).

151. *Id.*

152. *City of Seattle v. McCready*, 877 P.2d 686 (Wash. 1994).

153. *Id.* at 690.

154. *Aberdeen Apartments*, 820 N.E.2d at 165.

155. *Id.*

156. *Id.* at 171 (Baker, J., dissenting).

157. *Id.*

action by a landlord would not be in the best interests of the landlord because tenants would eventually object and landlord's ability to continue to lease the property would be hampered.¹⁵⁸

As further support for the court of appeals holding, the opinion cited a United States Supreme Court holding that "one of the essential sticks in the bundle of property rights is the right to exclude others."¹⁵⁹ A court's refusal to provide redress in the form of an action for trespass would infringe on the property owners' rights. Failure to afford this protection to landlords would open the common areas to use by the public without restriction, which would have a "deleterious effect on the landlord's business and would interfere with the privacy and repose that tenants expect from what is their home."¹⁶⁰ The opinion further discussed whether granting the injunction would violate the First Amendment free speech rights of the newspaper publisher and ultimately determined, over the objection of the dissent, that it does not constitute a prior restraint.¹⁶¹

IV. DEVELOPMENTS IN THE COMMON LAW OF PROPERTY

A. *Adverse Possession*

During the survey period, the Indiana Supreme Court decided *Fraley v. Minger*¹⁶² and re-characterized the common law requirements to establish title in land through adverse possession. In *Fraley*, the Mingers purchased twenty-four acres of farm land in rural Ripley county in 1955 from the Chaney's.¹⁶³ At the time they purchased the farm, the Mingers inquired as to the ownership of an adjoining two and a half acre tract, and were told by the Chaney's that they neither owned the tract nor knew the identity of the true owner. Later, the Mingers asked Truman Belew, their neighbor, if he was the owner of the two and a half acres. Belew told the Mingers that he did not own the parcel, and after Belew's death in 1994, the two-and-a-half acre tract was deeded unknowingly to Fraley in 1996.¹⁶⁴ Between the time of Belew's death and Fraley's acquisition of his property, the Mingers made inquiries about purchasing the disputed tract from Belew's estate, although nothing ever came of the inquiries.¹⁶⁵ After Fraley discovered that the disputed tract had been deeded to him, he filed suit to quiet title in the property.¹⁶⁶

The trial court found that the Mingers believed that the property was

158. *Id.* at 165 n.3 (majority opinion).

159. *Id.* at 166 (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980)).

160. *Id.* at 167.

161. *Id.* at 169.

162. 829 N.E.2d 476 (Ind. 2005).

163. *Id.* at 480.

164. *Id.*

165. *Id.* at 487.

166. *Id.* at 480.

unclaimed when they purchased their farm, and that they considered the two and a half acre tract as theirs as of 1956. The Mingers fenced the disputed tract in 1972 and installed a culvert in a ditch in order to access the property. Further, the trial court found that friends and neighbors believed that the tract belonged to the Mingers, and that it was used by the Mingers for pasturing livestock, cutting timber and as a recreational area for the Minger children and their friends.¹⁶⁷

Reaffirming the precedent of several earlier cases, the supreme court determined that a heightened standard of clear and convincing evidence is required to prove a claim of adverse possession.¹⁶⁸ The court noted that the law of adverse possession has a long history in Indiana, and that through the years courts have used different terms in defining the necessary elements for such claims, but overall, a claimant usually has been required to establish that her possession was actual, visible, open and notorious, exclusive, under claim of ownership, hostile, and continuous for the statutory-defined period.¹⁶⁹ In *Fraley*, however, the Indiana Supreme Court restated the test for adverse possession, holding that a claimant may obtain title to real estate by way of adverse possession by establishing, through clear and convincing evidence, the four elements of (i) control, (ii) intent, (iii) notice, and (iv) duration.¹⁷⁰ Control replaces the former elements of “actual” and “exclusive” possession and instead requires a claimant to prove that she has used and controlled the disputed property in a way that is customary considering the characteristics of such property. The element of intent replaces the former elements of “claim of ownership,” “exclusive,” “hostile,” and the more rarely used term “adverse.” Intent is established by the claimant showing that her intent was to establish complete ownership of the disputed property, superior to all others, above all that of the owner of record. Notice replaces the former elements of “visible,” “open,” “notorious,” and to a lesser degree, the element of “hostility,” by requiring a claimant to demonstrate that the title owner of the disputed property had actual or constructive notice of the claimant’s intent to exert exclusive control over the land. Finally, the *Fraley* element of duration replaces the former element requiring a claimant’s use to be “continuous,” and is established by the claimant demonstrating that she has fulfilled the other three elements for the requisite time period.¹⁷¹

The *Fraley* court held that all four of these elements were established by the Mingers. In applying the restated test, the court concluded that the trial court’s findings that the Mingers fenced the property and used it as a supply of timber, pasture land for cattle, and a recreational area, all supported the Mingers’ satisfaction of the element of control.¹⁷² The supreme court specifically

167. *Id.* at 480-81.

168. *Id.* at 483.

169. *Id.* at 483-85.

170. *Id.* at 486.

171. *Id.*

172. *Id.* at 488.

addressed Fraley's contention that the Mingers could not have adversely possessed the disputed tract because they did not use the tract under a mistaken belief of their actual ownership of the property.¹⁷³ Dismissing Fraley's argument, the court held that a claimant's possession need not be under any color of title to establish adverse possession.¹⁷⁴ Despite finding that a claimant does not need to address claim of ownership under the newly restated test, the court found that the Mingers established the element of intent by demonstrating that they believed that the disputed tract was unclaimed when they began to use it in 1956; others believed the tract belonged to the Mingers; they used the tract as their own; and "they claimed ownership hostile to Fraley's predecessors in title."¹⁷⁵ These factors, along with the installation of the culvert, were regarded by the court as sufficient to establish the element of notice.¹⁷⁶ Even though Fraley also attempted to disprove the Mingers' claim to the disputed property by arguing that their use of the land was not sufficiently continuous to establish adverse possession, the court reaffirmed two earlier adverse possession decisions where the characteristics of the land determined the continuity of use.¹⁷⁷ The Mingers' use of the property was found to be continuous despite its sporadic nature, because the property was rural and undeveloped, and was therefore not of a nature that would be used without interruption.¹⁷⁸ This, in addition to the trial court's finding that the Mingers' use of the two and a half acre tract continued from 1956 to 2002, was found to be sufficient to establish the element of duration for the required statutory period of ten years.¹⁷⁹

Further, Fraley also asserted that the Mingers' possession was not hostile since they asked about buying the disputed property after Belew's death, thus acknowledging the superior title of Fraley's predecessor in interest. The court quickly dispensed with this argument, however, by highlighting that title is vested through adverse possession at the end of the statutory period of ten years, which for the Mingers would have been approximately 1966. The court continued that if title had vested in the Mingers at that time, no subsequent inquiry on the part of the Mingers, even their expressed interest in buying the property sometime after Belew's death in 1994, could divest them of such title.¹⁸⁰

Despite having found that the Mingers had established the necessary elements for adverse possession at common law, the court ruled that the Mingers did not comply with the adverse possession tax statute, and therefore did not obtain title to the two and a half acre tract.¹⁸¹ Indiana Code section 32-21-7-1 stipulates that no person may obtain title through adverse possession "unless the

173. *Id.* at 485-86.

174. *Id.*

175. *Id.* at 488.

176. *Id.*

177. *Id.* at 487.

178. *Id.* at 487-88.

179. *Id.* at 488.

180. *Id.* at 487.

181. *Id.* at 493.

adverse possessor or claimant pays and discharges all taxes and special assessments due on the land or real estate during the period the adverse possessor or claimant claims to have possessed the land or real estate adversely.”¹⁸² In analyzing the tax statute, the *Fraleley* court reaffirmed its earlier case of *Echterling v. Kalvaitis*.¹⁸³ In *Echterling*, the court held that in addition to establishing the other elements of adverse possession, a claimant must pay all taxes and special assessments due on such land that they are claiming.¹⁸⁴ Although prior to *Fraleley* the Indiana Supreme Court had never reaffirmed or reconsidered *Echterling*, the Indiana Court of Appeals handed down several opinions after *Echterling* holding that where notice to the record title holder was otherwise established, compliance with the tax statute was not required for an adverse possessor to gain title to a parcel of real estate. The court of appeals reasoned that the tax statute was only meant to give notice to the owner of record that another party was using their property, because the title holder of record would receive a tax refund or tax statement showing that the taxes on the parcel being adversely possessed had been paid, thus alerting the owner to the presence of the adverse possessor.¹⁸⁵ The Indiana Supreme Court in *Fraleley*, however, made it clear that it rejected this line of decisions not only because of the conflict these cases presented with *Echterling*, but also because of the longstanding policy that legislative agreement with a particular judicial interpretation is assumed when the legislature does not take steps to modify a statute after the Indiana Supreme Court has applied it in one of its decisions. Because *Echterling* had stood for over fifty years and the General Assembly had not modified the adverse possession tax statute since the decision had been handed down, the court found that this signaled the legislature’s agreement with the court’s interpretation of the statute in *Echterling*.¹⁸⁶ The *Fraleley* court ultimately held that under *Echterling*, a claimant may satisfy Indiana Code section 32-21-7-1 and obtain title by way of adverse possession if the claimant had a reasonable good faith belief that she had paid taxes on the disputed land throughout the period of adverse possession.¹⁸⁷ The trial court did not make any finding that the Mingers paid, intended to pay, or believed that they were paying, taxes on the disputed property, and therefore the Indiana Supreme Court held that they did not adversely possess the two and a half acre tract.¹⁸⁸

The suggestion that a claimant’s *intent* to pay taxes may satisfy the statutory requirements was not fully addressed in *Fraleley*. The General Assembly after the *Fraleley* decision was issued, however, proposed an amendment that would have Indiana Code section 32-21-7-1 read “unless the adverse possessor or claimant pays and discharges all taxes and special assessments *that the adverse possessor*

182. IND. CODE § 32-21-7-1 (2005).

183. 126 N.E.2d 573 (Ind. 1955).

184. *Fraleley*, 829 N.E.2d at 489.

185. *Id.* at 490-91 (citing *Kline v. Kramer*, 386 N.E.2d 982, 989 (Ind. Ct. App. 1979)).

186. *Id.* at 492.

187. *Id.* at 493.

188. *Id.*

or claimant reasonably believes in good faith to be due on the land or real estate during the period the adverse possessor or claimant claims to have possessed the land or real estate adversely.”¹⁸⁹ Justices Sullivan and Rucker concurred in the result in *Fraleley*, but argued that *Echterling* should have been overruled and Indiana Code section 32-21-7-1 should be applied in accordance with its terms.¹⁹⁰

The Indiana Court of Appeals applied the restated *Fraleley* test to establish adverse possession in the claimants in *Nodine v. McNerney*.¹⁹¹ In this case, the claimants in 1994 were granted title by way of adverse possession to a strip of beachfront property in Steuben County adjoining their residential lots.¹⁹² The claimants filed a second action in 2002, asking the trial court to quiet title to portions of two streets that were bounded by seawalls that the claimants had erected and maintained.¹⁹³ In response, the plaintiffs’ neighbors filed a counterclaim asserting a prescriptive easement over portions of the plaintiffs’ property where a gravel path provided access to the nearby lake.¹⁹⁴

Based on the trial court’s pre-*Fraleley* findings, the court of appeals found that the claimants had not fully established the elements of intent, control, or notice.¹⁹⁵ In the first adverse possession action, the claimants admitted that their neighbors had a right to use the disputed areas of the streets that they were now claiming. The court of appeals reasoned that this acknowledgment demonstrated that the claimants “did not intend to claim full ownership of those areas and that they were not exerting exclusive control thereof” and that their possession “was not adverse or hostile.”¹⁹⁶ Further, before the claimants’ installation of the seawalls, the streets in question were virtually impassable. The court of appeals found that unlike the erection of a fence, which is often sufficiently hostile to establish adverse possession, the seawalls in *Nodine* had the opposite effect of inviting others to use the streets by making the lake more accessible. Thus, the court of appeals held that the claimants had not acquired the disputed areas by adverse possession, because they did not demonstrate the intent to claim full ownership or assert exclusive control over the disputed areas.¹⁹⁷ In regards to the easement for the gravel path, the *Nodine* court found that to establish a prescriptive easement, those claiming the easement must prove that their use was adverse, open notorious, continuous, and uninterrupted for twenty years under a claim of right or by continuous adverse use with the knowledge and acquiescence of the title owner.¹⁹⁸ The court found that it was unnecessary in this case to determine whether or not the *Fraleley* restatement was necessary when

189. H.B. 1114, 114th Gen. Assem., 2d Sess. (Ind. 2006) (emphasis added).

190. *Fraleley*, 829 N.E.2d at 493-94 (Sullivan, J., concurring).

191. 833 N.E.2d 57 (Ind. Ct. App. 2005).

192. *Id.* at 62.

193. *Id.*

194. *Id.* at 63-64.

195. *Id.* at 65-66.

196. *Id.* at 66.

197. *Id.* at 67.

198. *Id.* at 69.

considering prescriptive easements.¹⁹⁹

Therefore, after *Fraley*, a claimant must now establish the four common law elements of control, intent, notice, and duration, as well as the statutory element of paying property taxes in order to adversely possess real estate. Although the test has been restated, it is clear from both *Fraley* and *Nodine* that the use of hostility, adverse use, and claim of ownership will continue to be employed in some fashion in future adverse possession actions. Because the Indiana Supreme Court addressed adverse possession but not prescriptive easements in *Fraley*, the appropriate test for those types of easements is now unsettled. If passed, the proposed amendment to Indiana Code section 32-21-7-1 would clarify some of the questions left open in *Fraley* as to the issue of whether an adverse possessor's intent to pay property taxes on land they were claiming was sufficient to comply with the statute and also would confirm the Indiana Supreme Court's belief that the legislature had approved of *Echterling*.

B. Partition

In *Scottish Rite of Indianapolis Foundation, Inc. v. Adams*,²⁰⁰ the Indiana Court of Appeals ruled that a life tenant does not have standing to force the partition and sale of real property unless the sale would be advantageous to both parties.²⁰¹ The property at issue in this case was ninety-two acres of farm land in Hamilton County in which Adams inherited a life estate in 1992. A developer offered Adams and Scottish Rite over two million dollars to purchase the property in 2002, and after Adams and Scottish Rite could not come to terms as to how to allocate the proceeds with one another, Adams filed suit asking that the property be partitioned and sold, and the proceeds equitably divided. The trial court ordered that the farm be sold, holding that the life estate provided Adams with sufficient standing to petition the court for such a remedy and that the developer's interest had so increased the value of the farm that it was advantageous to both Adams and Scottish Rite to sell the property as Adams requested.²⁰²

Indiana Code sections 32-17-4-1²⁰³ and 32-17-4-23,²⁰⁴ do not allow a plaintiff to compel the disposition of real estate when the plaintiff only holds a life estate in the disputed property.²⁰⁵ Adams challenged the statutes as unconstitutional under the Equal Privileges Clause of the Indiana Constitution,²⁰⁶ but the court held that the Code reasonably, and therefore constitutionally, distinguishes

199. *Id.*

200. 834 N.E.2d 1024 (Ind. Ct. App. 2005).

201. *Id.* at 1025.

202. *Id.*

203. IND. CODE § 32-17-4-1 (2005).

204. *Id.* § 32-17-4-23.

205. *Adams*, 834 N.E.2d at 1026.

206. IND. CONST. art. I, § 23.

between life tenants and those holding fee simple title.²⁰⁷ Because a life tenant has a limited interest in a parcel of real estate and may only convey her interest in the right to possession during her lifetime, the court concluded that life tenants have inherent characteristics that allow them to be reasonably distinguished from fee simple owners, who hold the highest form of title and are allowed to freely alienate the property as they see fit.²⁰⁸

The court of appeals further reasoned that although at common law and under Indiana Code sections 32-17-4-1 and 32-17-4-23, the remedy of partition would not have been available to Adams, Indiana Code section 32-17-5-2²⁰⁹ permits those who hold a life estate to compel a sale of the real estate if the sale is "advantageous to the parties concerned."²¹⁰ The availability of a willing buyer alone will not render a potential sale advantageous for purposes of the Code, however. Scottish Rite, in fact, believed that the property would continue to appreciate dramatically, and therefore preferred to delay selling the land. Holding that "appreciation in value accrues solely to the benefit of the remainderman, not to the life tenant," the court of appeals denied Adams request for partition and concluded that because of the extraordinary increase in the value of the property, an immediate sale would not be advantageous to both parties because such increased value would accrue only to Scottish Rite.²¹¹

207. *Adams*, 834 N.E.2d at 1026-27.

208. *Id.* at 1027.

209. IND. CODE § 32-17-5-2.

210. *Adams*, 834 N.E.2d at 1026.

211. *Id.* (citing *Hauck v. Second Nat'l Bank*, 286 N.E.2d 852, 866-67 (Ind. Ct. App. 1972)).

RECENT DEVELOPMENTS IN INDIANA TAXATION

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INTRODUCTION

The 113th General Assembly, the Governor of Indiana, the Indiana Supreme Court, and the Indiana Tax Court contributed changes to the Indiana tax laws in 2005. This Article highlights the major developments that occurred throughout the year.¹ Whenever the term “General Assembly” is used in this Article, such term shall refer only to the Indiana General Assembly. Whenever the term “ISBTC” is used in this Article, such term shall refer only to the Indiana State Board of Tax Commissioners. Whenever the term “IBTR” is used in this Article, such term shall refer only to the Indiana Board of Tax Review. Whenever the term “IDSR” is used in this Article, such term shall refer only to the Indiana Department of State Revenue. Whenever the term “DLGF” is used in this Article, such term shall refer only to the Department of Local Government Finance. Whenever the term “Tax Court” is used in this Article, such term shall refer only to the Indiana Tax Court.

I. INDIANA GENERAL ASSEMBLY LEGISLATION

The 113th General Assembly passed several pieces of legislation affecting various areas of state and local taxation, i.e., property taxes, local taxes, inheritance tax, and sales and use taxes. There are also several other changes noted in the miscellaneous section. The most significant changes were in the area of property taxes.

A. *Property Tax*

The General Assembly passed legislation providing that the special property tax valuation procedures for integrated steel mill equipment is only applicable to equipment in a mill which produces steel in a blast furnace in Indiana.²

Also, the General Assembly passed legislation requiring Lake County, East Chicago, Gary, and Hammond to make payments to Indiana in fiscal years 2006 through 2008 for property tax circuit breaker credits claimed against Indiana income taxes in 2001, 2002, and 2003, which were not reimbursed in subsequent

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1. For comprehensive information concerning the Indiana Tax Court, the Indiana Department of State Revenue, the Indiana State Board of Tax Commissioners, and a variety of other tax-related information, visit Professor Jegen’s Taxsite at www.iupui.edu/~taxsite/ and the Access Indiana website at <http://www.accessindiana.org>.

2. IND. CODE § 6-1.1-3-23 (2005).

years.³ The statute requires the amounts for the unreimbursed credits to be deducted from supplemental Riverboat Admission Tax payments made from the Property Tax Replacement Fund.⁴ This legislation also provides that in the future, the cost of providing this property tax circuit breaker will be paid back to these areas by adding the costs into the supplemental Riverboat Admission Tax payments made to each of these local units.⁵

The General Assembly also opted to place limits on both the Property Tax Replacement Credit (“PTRC”) and the homestead credits. Included in the new limits are both a minimum amount that can be distributed for these credits and a maximum amount that the General Assembly can appropriate for these credits. The minimum distribution is equal to the total amount which was spent on these credits during 2002.⁶ The maximum appropriation amount is the minimum distribution amount plus an amount equal to the revenue raised by 1% of the current 6% Indiana and sales and use tax rates. If the distribution is too low, then the law requires the Property Tax Replacement Fund (“PTRF”) Board to increase homestead credit and PTRC rates in the following order:

- (1) Homestead credits from 20% to up to 30%;
- (2) School General Fund PTRC from 60% to up to 70%; and,
- (3) Regular PTRC from 20% to up to amount needed to reach the minimum distribution.⁷

If Indiana’s liability for these credits is too high for any year, then numbers one and two above would be proportionally reduced, but the homestead credits rate would remain unchanged.⁸

In addition, political subdivisions were granted the option of adopting an ordinance to provide a local homestead credit. This credit was established as an unfunded credit, and therefore, if allowed by a local government, would result in a loss of revenue to the political subdivision.⁹

Further, the same legislation that now allows adoption of a local option homestead credit also allows a credit for excessive residential property taxes.¹⁰ This credit must be approved by the county fiscal body and can be granted for any qualified residential property¹¹ that the county chooses to make eligible for

3. *Id.* § 4-33-13-5 (amended by 2005 Ind. Legis. Serv. P.L. 246-2005 (H.E.A. 1001) (West)); *id.* 6-3.1-20-7.

4. LEGIS. SERVS. AGENCY, FISCAL IMPACT STATEMENT HB1001, at 25 (2005) [hereinafter FISCAL IMPACT STATEMENT 1001], available at <http://www.in.gov/legislative/bills/2005/PDF/FISCAL/HB1001.009.pdf>. “[B]ased on income tax return data,” these “credits totaled approximately \$5.4 M in 2001; \$7.1 M in 2002; and \$6.8 M in 2003.” *Id.*

5. *Id.*

6. IND. CODE §§ 6-1.1-20.9-2; 6-1.1-21-2, -2.5.

7. FISCAL IMPACT STATEMENT 1001, *supra* note 4, at 20.

8. *Id.*

9. IND. CODE § 6-1.1-20.4.

10. *Id.* § 6-1.1-20.6.

11. *Id.* § 6-1.1-20.6-4 (“As used in this chapter, ‘qualified residential property’ refers to any

the credit. The credit is to be allowed for the amount by which the property taxes exceed 2% of the assessed value of the qualified residential property. This credit was established as an unfunded credit, but the statute permits local governments to borrow money, over a term of five years or less, to make up the revenue loss from providing this property tax credit.¹²

The General Assembly passed legislation allowing a person who owns or wants to own a brownfield¹³ to file a petition with the county auditor seeking a reduction or waiver of the delinquent tax liability. This legislation provides that the DLGF is to review these petitions, give notice of the DLGF's determination, and allow appeals of that determination by the IBTR.¹⁴

Also, the General Assembly passed legislation permitting a county library board to levy a property tax and distribute the tax to a private donation library under certain conditions. The only library board which currently meets the conditions of the statute is the Vanderburgh County Library Board.¹⁵ The law would therefore allow

the Vanderburgh County Library Board to levy a tax with a rate of not less than \$.0067 nor more than \$.0167 per \$100 of assessed valuation. Currently, Evansville is responsible for levying the tax. The law does not reduce the city of Evansville's maximum levy by the amount that had been levied for the library.¹⁶

In another effort to provide property tax relief, the General Assembly passed legislation allowing a county fiscal body to provide a property tax credit over four years to a homestead that had an excessive tax increase in the last general reassessment.¹⁷

of the following that a county fiscal body specifically makes eligible for a credit under this chapter in an ordinance adopted under section 6 of this chapter: (1) An apartment complex; (2) A homestead; (3) Residential rental property.”).

12. *Id.* § 6-1.1-20.6-9.

13. According to the United States Environmental Protection Agency, “the term ‘brownfield site’ means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.” U.S. EPA, *Brownfields Cleanup and Redevelopment*, <http://www.epa.gov/brownfields/glossary.htm> (last visited July 7, 2006).

14. IND. CODE § 6-1.1-45.5.

15. *Id.* § 36-12-7-8.

16. LEGIS. SERVS. AGENCY, FISCAL IMPACT STATEMENT HB1120, at 22-23 (2005) [hereinafter FISCAL IMPACT STATEMENT 1120], available at <http://www.in.gov/legislative/bills/2005/PDF/FISCAL/HB1120.010.pdf>.

17. *Id.* at 3.

Under this provision, each county would be permitted to provide property tax credits to homeowners in 2005, 2006, 2007, and 2008 if: (1) the net property tax on the homestead in 2003, after all credits are applied, was more than twice the amount of the 2002 net tax (an increase of more than 100%), and (2) the increase in net tax was at least \$500. Each year, the credit would equal the 2003 net tax increase multiplied by: 80%

The General Assembly also enacted legislation which directed the DLGF to develop instructions to determine the true tax value of certain mobile homes, which valuation must be the lesser of the values using the following: (1) the National Automobile Dealers Association Guide;¹⁸ (2) the purchase price of a mobile home if the sale is of a commercial enterprise nature and the buyer and seller are not related by blood or marriage; or (3) sales data for generally comparable mobile homes.¹⁹

In addition, the General Assembly directed the DLGF to develop instructions for identifying the fair market value of computer application software so that the value can be deducted from the total cost of the property with which the software is combined and which is subject to assessment.²⁰

Further, the General Assembly enacted a “property tax deduction for a building if materials made from coal combustion products are systematically used in the building’s construction.”²¹

The General Assembly enacted legislation that allows county treasurers, effective January 1, 2006, to optionally serve a written demand upon a county resident who is delinquent in the payment of personal property taxes annually, after May 10 but before October 31 of the *same* year. This is in addition to the written demand notice that is required to be sent after November 10 and before August 1 of the *succeeding* year.²² This legislation also provided a new formula for a creditor who acquires personal property on which the creditor has a lien to pay a delinquency from the proceeds of the property’s transfer. The law allows the creditor to first deduct any direct costs resulting from the transfer.²³

Also, the General Assembly passed legislation allowing a taxpayer to file an abatement schedule with the taxpayer’s personal property return. Previously, a taxpayer had to file a separate application for a property tax abatement. A copy of the abatement schedule must be forwarded to county and township assessors,

in 2005, 60% in 2006, 40% in 2007, and 20% in 2008. A county that wishes to provide the credits would have to adopt an ordinance before July 1, 2005. No application is required to receive the credit. The county auditor would identify the eligible homesteads and apply the credit. The entire 2005 credit could be applied to the tax installment that is due in November, 2005.

FISCAL IMPACT STATEMENT 1120, *supra* note 16, at 23.

18. These guides are available for purchase on the NADA Guides website, <http://www.nadaguides.org>.

19. IND. CODE § 6-1.1-31-7(b)(6) (2005).

20. *Id.* § 6-1.1-1-11. Note: “Under current DLGF assessment rules, computer application software owned by a business is considered intangible property and is not assessed except when cost of the application software cannot be separately identified because it is combined with the cost of property that is subject to assessment. In the case where the cost of the application software cannot be separately identified, no adjustment is made to the cost of the other asset(s) for reporting purposes.” FISCAL IMPACT STATEMENT 1120, *supra* note 16, at 22.

21. FISCAL IMPACT STATEMENT 1120, *supra* note 16, at 3.

22. IND. CODE § 6-1.1-23-1(a).

23. *Id.* § 6-1.1-23-1(d).

who have the power to deny or alter the amounts submitted. If the schedule is not denied before March 1 of the following year, then the county auditor is required to apply the abatement in the amount claimed or the amount as altered by the township or county assessor. The taxpayer has forty-five days to appeal a denial or alteration to the abatement schedule as submitted.²⁴

In addition, a new property tax deduction is available beginning with the March 2006 assessment if the taxpayer added to the assessed valuation of real property through development, redevelopment, or rehabilitation.²⁵ This deduction is also available for personal property purchased by the owner that was never before used by its owner in Indiana.²⁶ This real property deduction excludes “golf courses, country clubs, massage parlors, tennis clubs, racetracks, package liquor stores, residential property unless it is low income or in a residentially distressed area, or facilities for skating, racquet sport, hot tubs, suntans, retail food and beverage sales, automobile sales or service, or other retail facilities.”²⁷ The amount of the deduction is “equal to 75% of the AV increase in the first assessment year, 50% in the second year, and 25% in the third year.”²⁸ This statute also limits a property owner to no more than \$2 million assessed value for real property deductions and no more than \$2 million assessed value for personal property deductions.²⁹ A property owner is not allowed to claim this deduction in conjunction with other abatements.³⁰

The General Assembly pushed back the starting date for the next general reassessment of real property by two years. The general reassessment, which was previously set to start on July 1, 2007, will now begin on July 1, 2009, and must be completed by March 1, 2011.³¹

Also, the General Assembly delayed the implementation of annual adjustments to real property tax assessments. These adjustments, which were to start with 2005 assessments, will now start with the 2006 assessments.³² This legislation also allows the DLGF to employ professional appraisers to assist with these adjustments.³³ Also, the General Assembly amended the factors that must be included in the annual adjustment rule of the DLGF.³⁴ In addition, the DLGF

24. LEGIS. SERVS. AGENCY, FISCAL IMPACT STATEMENT SB1, at 7 (2005) [hereinafter FISCAL IMPACT STATEMENT SB1], available at <http://www.in.gov/legislative/bills/2005/PDF/FISCAL/SB0001.008.pdf>.

25. IND. CODE §§ 6-1.1-12.1-5, -5.1, -5.4, -5.6.

26. *Id.* § 6-1.1-12.4.

27. FISCAL IMPACT STATEMENT SB1, *supra* note 24, at 7.

28. *Id.*

29. *Id.*

30. *Id.*

31. IND. CODE § 6-1.1-4-4 (2005).

32. *Id.* § 6-1.1-4-4.5.

33. *Id.* §§ 6-1.1-4-16, -17.

34. LEGIS. SERVS. AGENCY, FISCAL IMPACT STATEMENT SB327, at 1 (2005) [hereinafter FISCAL IMPACT STATEMENT SB327], available at <http://www.in.gov/legislative/bills/2005/PDF/FISCAL/SB0327.008.pdf>.

is required to: (1) review and certify the adjustments; (2) establish local deadlines for the adjustment determinations; (3) train assessors and county auditors in the verification of sales; and (4) approve the choice of an assessor not to hire professional appraisers to assist with the general reassessment.³⁵ The law also directs the DLGF to make the annual adjustment base rate for agricultural land \$880 per acre for the 2005 and 2006 assessments.³⁶

The General Assembly also passed legislation which requires the DLGF to adopt rules by July 1, 2006, to establish a statewide uniform and common property tax management system. The law requires a combination of the county auditor, county treasurer, and state computer systems for property tax assessment. The DLGF is also required to appoint an advisory committee with local assessors as members to assist in the implementation of the system.³⁷

Further, the General Assembly authorized the DLGF to take over local assessment, reassessment, or annual adjustment activities. The DLGF, in order to conduct this takeover, must give at least sixty days notice and make a determination that the activities are not being performed properly.³⁸ The law also requires that this DLGF assessment be paid from the county assessment fund.³⁹

In addition, the \$10 filing fee for sales disclosure forms was extended for six years.⁴⁰ This law requires 40% of revenue from the fee in the Assessment Training and Administration Fund, instead of the state General Fund, and allows the IBTR to use money in that fund to conduct appeal activities.⁴¹ This legislation also amended what is required to appear on the sales disclosure form and required sales disclosure forms to be submitted for property exempt from property taxes.⁴² Also, the telephone number and name of the person who prepared the form is now required to appear on the sales disclosure form.⁴³

The General Assembly also passed legislation which requires the IDSR to withhold a portion of the state property tax replacement and homestead credit distributions to a county if ⁴⁴:

- (1) The county assessor fails to forward sales disclosure forms to the DLGF in a timely manner;
- (2) Local assessors have not forwarded *Form 15* assessment information to the DLGF in a timely manner;
- (3) The county auditor fails to pay a contractor's bill under state-conducted assessment or reassessment;

35. *Id.*

36. *Id.* § 6-1.1-1-3.1.

37. *Id.* § 6-1.1-31.5-3.5.

38. *Id.* §§ 6-1.1-4-31, -31.5, -31.6, -31.7.

39. *Id.* § 6-1.1-4-27.5.

40. FISCAL IMPACT STATEMENT SB327, *supra* note 34, at 2.

41. *Id.*

42. IND. CODE § 6-1.1-5-5.5.

43. *Id.*

44. *Id.* § 6-1.1-21-4.

- (4) Local assessors have not transmitted parcel level assessment data to the DLGF by October 1;
- (5) The county has not established a parcel number indexing system in a timely manner; or,
- (6) A township or county official has not provided other required information to the DLGF in a timely manner.⁴⁵

Also, legislation was adopted that prohibits an appraiser (or a technical advisor) who contracts with a township or county from representing taxpayers in an appeal, unless the appraiser's contract with the local unit is over and the appraiser was not directly involved with the taxpayer's issue while under contract.⁴⁶

The General Assembly chose to allow retroactive property tax exemptions for: (1) a youth soccer association;⁴⁷ (2) a religious organization;⁴⁸ (3) a sorority;⁴⁹ and (4) a conservation organization.⁵⁰ These exemptions are meant to address specific situations for specific organizations that failed to properly apply or receive a property tax exemption (to which the organization would have been entitled) in the year in which the property taxes were assessed.

Additionally, the General Assembly passed legislation which allows a taxpayer to file an assessment registration notice with the county assessor or the area plan commission.⁵¹

The General Assembly set the term of a member of the Property Tax Assessment Board of Appeals ("PTABOA") at one year.⁵²

The General Assembly also adjusted requirements for notice by the DLGF to taxpayers who object to local budgets and levies and established a procedure for resolution and appeal of property tax abatements.⁵³

In the area of local property tax credits funded by appeal settlements, the General Assembly provided that the part of the money received from certain property tax settlements that is attributable to taxes imposed by a political subdivision may be used to provide property tax credits in the political subdivision to taxpayers other than taxpayers that paid the settlement.⁵⁴

Also, in an effort to alleviate the shift of property taxes to homeowners resulting from the elimination of the inventory tax, the General Assembly extended (to June 2005) the time allowed for a county to start providing a

45. FISCAL IMPACT STATEMENT SB327, *supra* note 34, at 10.

46. IND. CODE § 6-1.1-31.7-3.5.

47. 2005 Ind. Legis. P.L. 228-2005 (S.E.A. 327) § 35 (West).

48. *Id.* § 36-37.

49. *Id.* § 33.

50. *Id.* § 38.

51. IND. CODE § 6-1.1-5-15.

52. *Id.* § 6-1.1-28-1.

53. *Id.* § 6-1.1-17-13.

54. *Id.* §§ 6-3.5-7-25, -25.5, -26; 255 Ind. Legis. P.L. 199-2005 (S.E.A. 496) § 46 (West).

homestead credit funded from the County Economic Development Income Tax.⁵⁵ Also, a deduction from property taxes for inventory assessed in 2005 was extended.⁵⁶

The General Assembly also authorized the fiscal body of a local unit of government to review a public library board's operating budget if the board is made up of a majority of appointed members (vs. elected) and has proposed a tax levy increase of over 5%.⁵⁷

Further, the General Assembly passed legislation which set forth a new property tax assessment method for certain low income rental property.⁵⁸ Beginning with property taxes paid in 2007, this law sets the assessed value of low income rental housing that is eligible for Section 42 credits at the greater of (1) the amount determined under the income capitalization method or (2) the value that would result in taxes equal to 5% of the annual total gross rents for the property.⁵⁹ This provision's effect on the assessed value of low income housing is unknown at this time, but could result in an increase in the assessments of some properties.⁶⁰

B. Local Taxation

The distribution formula of the Vanderburgh County Innkeeper's Tax was altered by the General Assembly in order to extend the deadlines when distributions would cease and the legislation specifically changed the distributions to the Convention Center Operating Fund and the Tourism Capital Improvement Fund.⁶¹

The General Assembly also adopted several changes to the way local option income taxes were redistributed to local units of government. The formula now excludes property taxes which were used to pay debt issued after June 2005 and includes the previous year's distribution to the local unit.⁶² This legislation also allows the IDSR to make adjustments to certified distributions when a local unit increases the local option tax rate.⁶³

Further, as a means to help fund the construction of a new stadium for the Indianapolis Colts, the General Assembly authorized Indianapolis to increase the rates of the following taxes: (1) the County Supplemental Auto Rental Excise Tax; (2) the County Innkeeper's Tax; (3) the County Food and Beverage Tax;

55. LEGIS. SERVS. AGENCY, FISCAL IMPACT STATEMENT SB496, at 2 (2005) [hereinafter FISCAL IMPACT STATEMENT SB496], available at <http://www.in.gov/legislative/bills/2005/PDF/FISCAL/SB0496.009.pdf>.

56. IND. CODE § 6-1.1-12-41.

57. *Id.* §§ 6-1.1-17-20; 36-12-14.

58. *Id.* § 6-1.1-4-39.

59. *Id.* § 6-1.1-4-41.

60. *See id.*

61. *Id.* §§ 6-9-2.5-7 to -7.7.

62. *Id.* § 6-3.5-1.1-1.

63. *Id.* §§ 6-3.5-1.1-9, -12, -14, -15; 6-3.5-6-1.1, -17, -18; 6-3.5-7-11.

and (4) the County Admissions Tax.⁶⁴ This legislation also repealed the law which would have terminated the Marion County Food and Beverage Tax.

In addition, in an effort to spread out the cost of the Colts stadium, the General Assembly authorized the counties contiguous to Marion County and certain municipalities located in those counties, to adopt a Food and Beverage Tax.⁶⁵ These revenues are also dedicated to stadium funding.⁶⁶

Further, Lake and Porter counties were authorized by the General Assembly to impose a 1% Food and Beverage Tax.⁶⁷ The revenue from these taxes is to be dedicated to the Northwest Indiana Regional Development Authority ("NIRDA").⁶⁸ Also, if Porter County increases its County Economic Development Income Tax ("CEDIT") rate, the first \$3.5 million of the tax revenue that results each year from the rate increase must be used by the county to make the county's required transfer to NIRDA.⁶⁹ The legislation also authorized Lake and Porter counties to use CEDIT revenue to provide additional homestead credits for property taxes.⁷⁰

In addition, the General Assembly authorized Howard County to increase the County Option Income Tax ("COIT") rate by 0.25% over the current maximum rate to operate a county jail or juvenile center.⁷¹ Similarly, this legislation provided that Miami County could increase the COIT rate by 0.25% over the current maximum rate to finance a county jail.⁷²

The General Assembly also allowed the Evansville city council to impose a Supplemental Auto Rental Excise Tax in Vanderburgh County,⁷³ and Tippecanoe County was permitted to increase its Innkeeper's Tax from 5% to 6%.⁷⁴ Additionally, Hendricks County was authorized to impose an Innkeeper's Tax to replace the Innkeeper's Tax it currently imposes under the Uniform Innkeeper's Tax Law.⁷⁵

In addition, Wayne County and, under certain conditions, municipalities in Wayne County were authorized by the General Assembly to impose a Food and Beverage Tax.⁷⁶ The town of Avon and the city of Martinsville were also authorized to impose a Food and Beverage Tax.⁷⁷

As an additional means to provide funding for the new Colts stadium and

64. *Id.* §§ 6-9-8-3; 6-9-12-5; 6-9-12-8; 6-9-13-1, -2.

65. *Id.* §§ 6-9-35-1 to -16.

66. *Id.*

67. *Id.* § 6-9-36-8.

68. *Id.* §§ 6-9-36-1 to -8.

69. *Id.* § 6-3.5-7-13.1.

70. *Id.*

71. *Id.* § 6-3.5-6-28.

72. *Id.* §§ 6-3.5-6-27; 6-3.5-7-5.

73. *Id.* §§ 6-6-9.5-1 to -13.

74. *Id.* §§ 6-9-7-6, -7, -9.

75. *Id.* §§ 6-9-37-1 to -8.

76. *Id.* §§ 6-9-38-1 to -26.

77. *Id.* §§ 6-9-27-1 to -10.

convention center, the General Assembly authorized the Budget Director to increase the amount of Indiana tax revenue that is annually captured by the Marion County Professional Sports Development Area.⁷⁸ This law authorizes such Development Area to capture \$11 million in addition to the previous tax revenue capture limitation of \$5 million.⁷⁹ Among the tax revenues that can be captured are the Indiana sales and use taxes and the Indiana adjusted gross income tax.⁸⁰

Also, the General Assembly directed Lake County to distribute 25% of the Admissions Tax revenue to the municipalities of Cedar Lake, Crown Point, Dyer, Griffith, Highland, Hobart, Lake Station, Lowell, Merrillville, Munster, New Chicago, St. John, Schererville, Schneider, Winfield, and Whiting.⁸¹ The legislation provided that these municipalities may only use the revenue distributed by the county for infrastructure purposes.⁸²

The General Assembly also passed legislation authorizing a civil taxing unit to use their distributive share of CEDIT for any lawful purpose.⁸³ Previously, CEDIT revenues could only be used for:

- (1) replacement of lost property tax revenue from schools and taxing units due to the homestead credit;
- (2) operation of public communications systems and computer facilities;
- (3) operation of public transportation corporations;
- (4) finance certain economic development project bonds;
- (5) to fund certain redevelopment initiatives in Marion County; and,
- (6) to make allocations of distributive shares to civil taxing units.⁸⁴

Further, a county, city, or town may use COIT revenue for any lawful purpose.⁸⁵ Before passage of this law, COIT revenues could be used for several purposes including:

- (1) county, city, or town economic or capital development projects;
- (2) capital improvement plans;
- (3) fund increased homestead credit due to the reduction of state and county inventory taxes; and
- (4) maintenance of courthouse facilities.⁸⁶

The General Assembly extended Henry County's authority to pay for capital improvements with Food and Beverage Tax revenues from December 31, 2004,

78. *Id.* § 36-7-31-14.1.

79. *Id.*

80. *Id.*

81. *Id.* §§ 4-33-12.5-1 to -8. Note: this legislation was a codification of current practice in Lake County. See FISCAL IMPACT STATEMENT 1120, *supra* note 16, at 18.

82. IND. CODE § 4-33-12.5-8.

83. *Id.* § 6-3.5-7-13.1(b)(3).

84. *Id.*

85. *Id.* § 6-3.5-6-19.

86. *Id.*

to December 31, 2015.⁸⁷ This legislation also extended for the same period Henry County's authority to issue bonds or enter into leases or other obligations payable from Food and Beverage Tax revenues.⁸⁸ In amending these statutory provisions, the General Assembly also listed the unique characteristics of Henry County which allow for this localized type of legislation.⁸⁹

The General Assembly also specified that Henry County may use the Food and Beverage Tax revenues to pay facility costs and authorized the use of other available resources to be pledged to bonds payable from Food and Beverage Tax revenues.⁹⁰ The new law provides that these bonds can only be issued for a term not to exceed twenty years.⁹¹

C. Inheritance Tax

The General Assembly adopted legislation automatically extending the due date for the Indiana inheritance tax return if the Internal Revenue Service allows an extension for a Federal Estate Tax return.⁹² The extension for the Indiana return will be the same as the extension for the Federal return.⁹³

Additionally, the General Assembly enacted legislation stating that, for the purpose of the inheritance tax:

- (1) an individual adopted as an adult shall be treated as the natural child of the adopting parent, if the adoption was finalized before July 1, 2004 (former law required an individual to be adopted before being emancipated in order to be treated as the natural child of the adopting parent);
- (2) a stepchild of the transferor is a Class A beneficiary, whether or not the stepchild is adopted by the transferor; and
- (3) a lineal descendant of a stepchild of a transferor, whether or not the stepchild is adopted by the transferor, is a Class A transferee.⁹⁴

D. Sales and Use Tax

The General Assembly adopted statutory changes to conform Indiana's definition of tobacco to the requirements of the Streamlined Sales and Use Tax Agreement.⁹⁵ Also, sellers and certified service providers are allowed the same monetary allowances as provided in the Agreement.⁹⁶

87. *Id.* § 6-9-25-9.5.

88. *Id.*

89. *Id.* § 6-9-25-1.

90. *Id.* § 6-9-25-11.5.

91. *Id.*

92. *Id.* § 6-4.1-4-2.

93. *Id.*

94. *Id.* § 6-4.1-1-3.

95. *Id.* §§ 6-2.5-1-28; 6-2.5-5-20.

96. *Id.* § 6-2.5-11-10.

Additionally, the General Assembly established a partial sales tax exemption for purchases of cargo trailers and recreational vehicles if the trailer or vehicle was to be titled or registered for use in another state.⁹⁷ The exemption for these purchases is equal to the sales tax imposed in Indiana minus the sales tax that would have been imposed in the state of title or registration.⁹⁸ This exemption effectively allowed nonresident purchasers of cargo trailers and recreational vehicles to pay sales tax to Indiana at the same rate the nonresident would have paid had they purchased the item in their home state.⁹⁹

The General Assembly also established a full sales tax exemption for aircraft that are purchased in Indiana to be titled or registered for use in another state.¹⁰⁰

The General Assembly also made changes to and established new Indiana sales and use tax exemptions. Legislation was adopted that provides a sales and use tax exemption for tangible personal property that: (1) is leased, owned, or operated by a professional racing team; and (2) comprises any part of a professional motor racing vehicle, excluding tires and accessories.¹⁰¹ This was a statutory expansion of this exemption, but the IDSR had previously been applying the exemption in this manner.¹⁰²

The General Assembly also provided a refund of 50% of the sales taxes paid on transactions involving research and development equipment for fiscal year 2006 and fiscal year 2007.¹⁰³ Further, the General Assembly established a full sales tax exemption on research and development equipment beginning in fiscal year 2008.¹⁰⁴

E. Miscellaneous

Businesses that operate on closed military bases receive tax incentives such as a sales tax exemption for utility purchases, a Corporate Adjusted Gross Income ("AGI") tax rate reduction, and an AGI tax credit for equity and debt financing.¹⁰⁵ In 2005, the General Assembly passed legislation which allows these same tax incentives for a business located in a "Qualified Military Base Enhancement Areas."¹⁰⁶ Qualified Military Base Enhancement Areas include certified technology parks located within a five mile radius of the Crane Naval Warfare Center.¹⁰⁷

97. *Id.* § 6-2.5-5-39.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* § 6-2.5-5-37; *see* FISCAL IMPACT STATEMENT SB1, *supra* note 24, at 3.

102. *Id.*

103. IND. CODE § 6-2.5-6-16.

104. *Id.* § 6-2.5-5-40.

105. *Id.* §§ 36-7-34-1 to -5.

106. *Id.*

107. LEGIS. SERVS. AGENCY, FISCAL IMPACT STATEMENT SB571, at 1 (2005) (explaining IND. CODE § 36-7-34 (2005)), *available at* <http://www.ing.gov/legislative/bills/2005/PDF/FISCAL/>

The Indiana Earned Income Tax Credit (which equals 6% of the Federal Earned Income Credit) was scheduled to sunset on December 31, 2005. The General Assembly extended the sunset date to December 31, 2011.¹⁰⁸

The General Assembly also updated the Indiana tax code to include reference to certain Internal Revenue Code regulations.¹⁰⁹ This legislation requires that: “(1) ‘Section 179 property’ deductions in excess of \$25,000 per year; and (2) ‘Section 199’ domestic production activities deductions allowed for federal income tax purposes be added back for state income tax purposes.”¹¹⁰

The budget law also contained a provision to continue to use the 2006 formula for computing the county Hospital Care for the Indigent property tax levy through calendar year 2008.¹¹¹ Before passage of this provision, the law was set to change this formula in 2007.¹¹²

An emergency rule adopted by the Indiana Gaming Commission in April 2005 was voided by the General Assembly.¹¹³ The rule was adopted to impose a transfer fee when the controlling interest in a riverboat license is transferred.¹¹⁴ Under the emergency rule, the transfer fee would be equal to 1% of the adjusted gross wagering receipts generated during the preceding fiscal year by the riverboat being transferred.¹¹⁵ The law also voided any other rule adopted after April 1, 2005, by the Indiana Gaming Commission that establishes a transfer fee for riverboat licenses, including operating permits.¹¹⁶

The Tax Amnesty Program was established in the 2005 session. This program allowed a waiver of unpaid interest, penalties, and fees upon payment of delinquent taxes during the amnesty period.¹¹⁷ This legislation also allowed waiver of interest, penalties, and fees if the taxpayer paid the delinquent taxes in conformity with a payment plan established by the IDSR.¹¹⁸ The amnesty period was required to be set by the IDSR, could last no longer than eight business weeks, and is required to end no later than July 1, 2006.¹¹⁹

The General Assembly increased the amount of Voluntary Remediation Tax Credits allowed in a state fiscal year to \$2 million.¹²⁰ The period for which the credit may be claimed was extended to taxable years beginning before December

SB0571.008.pdf.

108. IND. CODE § 6-3.1-21-10.

109. *Id.* §§ 6-3-1-3.5; 6-3-1-11; 6-1-3-33; 6-5.5-1-2; 6-5.5-1-20; 2005 Ind. Legis. Serv. P.L. 246-2005 (H.E.A. 1001) (West).

110. FISCAL IMPACT STATEMENT 1001, *supra* note 4, at 2.

111. IND. CODE § 12-16-14-3.

112. *Id.*

113. FISCAL IMPACT STATEMENT 1001, *supra* note 4, at 2.

114. *Id.*

115. *Id.*

116. *Id.*

117. IND. CODE § 6-8.1-3-17.

118. *Id.*

119. *Id.*

120. *Id.* § 6-3.1-23-15.

31, 2007.¹²¹ This legislation also changed the entity that approves this credit to the Indiana Development Finance Authority.¹²² This law also changed the calculation of the amount of the credit.¹²³

Another tax incentive law passed by the General Assembly includes the Enterprise Zone ("EZ") Investment Deduction. This deduction allows a taxpayer who makes a qualified investment in EZ property¹²⁴ to obtain a deduction against the assessed value of the property.¹²⁵ The legislation also requires the EZ Investment deduction to be added to the calculation of the fee owed by the taxpayer to the EZ Fund.¹²⁶

If Indiana becomes responsible for administering the Federal Unemployment Tax Act,¹²⁷ the General Assembly authorized the Department of Workforce Development to increase the unemployment tax from 3.1% to 3.5%.¹²⁸

The General Assembly also passed a provision that required the Indiana Economic Development Council to begin administering the Economic Development for a Growing Economy Tax Credit and the Hoosier Business Investment Tax Credit on February 9, 2005, instead of July 1, 2005.¹²⁹

In the 2005 session, the General Assembly extended from December 31, 2005, to December 31, 2011, the deadline for allowing the establishment of a new tax increment financing allocation area.¹³⁰ This legislation also provides that this deadline will be automatically extended unless the General Assembly enacts a statute that terminates the automatic extensions and sets a final deadline.¹³¹

Additionally, the General Assembly extended the deadline for a local unit of government to designate an area an economic revitalization area or an economic development project district from December 31, 2005, to December 31, 2011.¹³²

121. *Id.* § 6-3.1-23-16.

122. *Id.* § 6-3.1-23-5. Previously these credits were approved by the local fiscal body.

123. *Id.* § 6-3.1-23-6. The calculation results in a credit equal to the lesser of: (1) \$200,000; or (2) the sum of the first \$100,000 of qualified investment, plus 50% of the qualified investment over \$100,000.

124. *Id.* § 6-1.1-45-7. Under the bill, qualified investment at an EZ location includes: (1) purchase of a building, new manufacturing or production equipment, or new computers and related office equipment; (2) costs associated with the repair, rehabilitation, or modernization of an existing building and related improvements; (3) onsite infrastructure improvements; (4) construction of a new building; and (5) costs associated with retooling existing machinery. FISCAL IMPACT STATEMENT 1120, *supra* note 16, at 21.

125. IND. CODE § 6-1.1-45-9.

126. FISCAL IMPACT STATEMENT 1120, *supra* note 16, at 7. "Businesses receiving EZ incentives must pay a fee equal to 1% of the incentives obtained by the business if the incentives exceed \$1,000 during the year."

127. 26 U.S.C. §§ 3301-3311 (2000).

128. IND. CODE § 22-4-37-3.

129. FISCAL IMPACT STATEMENT 1120, *supra* note 16, at 5.

130. IND. CODE § 36-7-14-39.

131. *Id.* §§ 36-7-14-39; 36-7-15.1-26, -53.

132. *Id.* § 6-1.1-12.1-9.

These districts allow a local unit of government to provide property tax deductions and abatements for certain items and properties.¹³³ This law also repealed the geographic limitations for tax abatements for new logistical distribution equipment and new information technology equipment. Previously these abatements were only allowed for certain counties located along Interstate Highway 69.

The General Assembly passed legislation that prohibits the Alcohol and Tobacco Commission from issuing, renewing, or transferring any alcoholic beverage permit if the applicant has not paid Innkeeper's Taxes that are currently due.¹³⁴

Legislation also passed which increased the qualified research expense credit from 10% to 15% on the first \$1 million of investment for taxable years beginning after December 31, 2007.¹³⁵ The carryover term for this credit was also reduced from fifteen years to ten years.¹³⁶

Also, the General Assembly elected to increase the aggregate amount of venture capital investment tax credits that may be awarded in a calendar year from \$10 million to \$12.5 million.¹³⁷ The carryover for this credit was also limited to five taxable years.¹³⁸ The law excludes certain debt financing of financial institutions from qualifying for credit.¹³⁹ Also, companies who are involved with professional motor vehicle racing were made eligible for this credit.¹⁴⁰

The General Assembly established a headquarters relocation tax credit which provides a business that relocates its corporate headquarters to Indiana a credit against its state tax liability equal to 50% of the costs incurred in relocating the headquarters.¹⁴¹

The General Assembly also passed legislation allowing the Indiana Supreme Court to appoint a senior judge to serve on the Tax Court.¹⁴²

The General Assembly established an income tax credit for biodiesel, blended biodiesel, and ethanol production.¹⁴³ The Indiana Economic

133. *Id.* §§ 6-1.1-12.1-1, -2, -5.6; 6-1.1-39-2.

134. *Id.* § 7.1-3-21-15.

135. *Id.* § 6-3.1-4-2.

136. *Id.* §§ 6-3.1-4-1, -3, -7.

137. *Id.* § 6-3.1-24-9.

138. *Id.* § 6-3.1-24-12.

139. *Id.* §§ 6-3.1-24-3, -12.5. Note: this exclusion applies "to debt financing provided by a financial institution after May 15, 2005, if it is secured by a mortgage or other agreement that establishes a collateral or security position for the financial institution that is senior to collateral or security interests of other investors in the qualified company." FISCAL IMPACT STATEMENT SB1, *supra* note 24, at 5.

140. IND. CODE § 6-3.1-24-7.

141. *Id.* §§ 6-3.1-30-1 to -13.

142. *Id.* §§ 33-23-3-1, -4.

143. *Id.* §§ 6-3.1-27-1 to -13; 6-3.1-28-1 to -11.

Development Corporation is required to review and approve these credits.¹⁴⁴ The law set a cap of \$20 million on the total number of credits that may be provided for all taxable years.¹⁴⁵ The credit can be carried over for six taxable years.¹⁴⁶

The General Assembly extended the blended biodiesel retailer tax credit to dealers that distribute blended biodiesel at retail by means other than a metered pump.¹⁴⁷ This credit may not be taken after December 31, 2006.¹⁴⁸

A taxpayer, who opens an integrated coal gasification power plant and agrees to use Indiana coal in the power plant is eligible to receive a tax credit under legislation adopted by the General Assembly. The credit is to be taken in installments over ten years and is equal to the sum of: (1) 10% of the first \$500 million of qualified investment; plus (2) 5% of any qualified investment over \$500 million.¹⁴⁹

The General Assembly adopted several changes to the Economic Development for a Growing Economy ("EDGE") tax credit. The Indiana Economic Development Corporation ("IEDC"), in evaluation of EDGE credit applications, is required to

determine whether the average compensation paid by the applicant during the applicant's previous fiscal year exceeds: (1) the average compensation paid to employees working in the same industry sector to which the applicant's business belongs within the county in which the applicant's business is located, if there is more than one business in that industry sector in the county; (2) the average compensation paid to employees working in the same industry sector to which the applicant's business belongs in Indiana, if the applicant's business is the only business in that industry sector in the county in which the applicant's business is located but there is more than one business in that industry sector in Indiana; or, (3) twice the federal minimum wage, if the applicant's business is the only business in Indiana in the industry sector to which the applicant's business belongs.¹⁵⁰

Additionally, the IEDC is permitted to consider other wage comparisons in evaluating an EDGE credit application.¹⁵¹

144. *Id.*

145. *Id.* §§ 6-3.1-27-9.5; 6-3.1-28-11.

146. *Id.* §§ 6-3.1-27-12; 6-3.1-28-9.

147. *Id.* § 6-3.1-27-3.2.

148. *Id.* § 6-3.1-27-10.

149. *Id.* §§ 6-3.1-29-1 to -21.

150. LEGIS. SERVS. AGENCY, FISCAL IMPACT STATEMENT SB414, at 1 (2005) [hereinafter FISCAL IMPACT STATEMENT SB414], available at <http://www.in.gov/legislative/bills/2005/PDF/FISCAL/SB0414.009.pdf> (explaining IND. CODE § 6-3.1-13-17 (2005)).

151. IND. CODE §§ 6-3.1-13-15.5, -21.

The bill also provides that the IEDC may, in evaluating an EDGE credit application to create jobs in Indiana after December 31, 2005, consider whether the average wage paid by the applicant exceeds the average wage paid to: (1) all employees working in the

Further, when an EDGE credit is granted to retain existing jobs, an applicant is no longer required to provide evidence of a competing job site.¹⁵² This legislation also reduced the number of employees, from 200 to seventy-five, which the applicant must employ.¹⁵³

If a business receiving an EDGE credit is “located in a Community Revitalization Enhancement District (CRED) or Certified Technology Park (CTP), the political subdivision that created the CRED or CTP must have adopted an ordinance recommending a credit at least as large as the EDGE credit amount awarded by the IEDC.”¹⁵⁴ Additionally, EDGE credits that are granted to businesses in a CRED or CTP are required to be deducted from the income tax increment amount the state pays to a CRED or CTP.¹⁵⁵ Also, in the statutory provisions concerning CTPs, this legislation set forth definitions for both the gross retail and income incremental amounts.¹⁵⁶

Applicants for an EDGE credit must agree to maintain operations for at least two years after the last year in which a credit or carryover is claimed.¹⁵⁷ Previously an applicant had to agree to maintain operations in the state for a period twice as long as the term of the credit.¹⁵⁸ Also, the \$5 million statewide annual cap on EDGE credits for job retention was extended through the 2006 and 2007 state fiscal years.¹⁵⁹

The General Assembly authorized Department of Defense aerospace contractors to calculate the research expense tax credit in a different way. The calculation allows the contractor to multiply the difference between the contractor’s qualified research expenses for the taxable year and 50% of the average of the contractor’s qualified research expenses for the preceding three taxable years by a percentage to be determined by the IEDC that may not to

same industry sector to which the applicant’s business belongs in the county in which the applicant’s business is located, if there is more than one business in that industry sector in the county; (2) all employees working in the same industry sector to which the applicant’s business belongs in Indiana, if the applicant’s business is the only business in that industry sector in the county in which the applicant’s business is located but there is more than one business in that industry sector in Indiana; or (3) all employees working in the county in which the applicant’s business is located, if the applicant’s business is the only business in Indiana in the industry sector to which the applicant’s business belongs.

FISCAL IMPACT STATEMENT SB414, *supra* note 150, at 1.

152. *Id.* at 2.

153. *Id.*; IND. CODE § 6-3.1-13-15.5.

154. FISCAL IMPACT STATEMENT SB414, *supra* note 150, at 2 (explaining IND. CODE § 6-3.1-13-15).

155. FISCAL IMPACT STATEMENT SB496, *supra* note 55, at 1.

156. IND. CODE §§ 36-7-13-2.6, -3.4; 36-7-32-6.5, -8.5.

157. FISCAL IMPACT STATEMENT SB414, *supra* note 150, at 2.

158. *Id.* §§ 6-3.1-13-19, -19.5.

159. *Id.* § 6-3.1-13-18.

exceed 10%.¹⁶⁰

The General Assembly also added provisions to various statutes, which provisions require notice to be given to any taxing unit that is affected by the creation of a Community Revitalization Enhancement District or a Professional Sports Development Area.¹⁶¹

Previously, the Hoosier business investment tax credit was allowed for the lesser of the company's state tax liability growth or 30% of an investment which met certain conditions provided in statute. That amount was changed from 30% to a percentage to be determined by the IEDC, and the state liability tax growth option was deleted.¹⁶² The percentage determined by the IEDC is not allowed to exceed 10%.¹⁶³ This legislation also removed the residency requirement for the credit.¹⁶⁴ The IEDC is also allowed to specify the carryover for this credit, but the carryover period may not exceed nine years.¹⁶⁵

This legislation also contained provisions which added both of the following items to the list of allowable expenses for the Hoosier business investment tax credit: (1) distribution, transportation, and logistical distribution equipment; and (2) costs incurred before 2008 relating to motion picture or audio production.¹⁶⁶ The General Assembly also opted to limit a taxpayer to one state tax credit per project.¹⁶⁷

II. INDIANA SUPREME COURT DECISIONS

The Indiana Supreme Court ("supreme court") rendered a variety of opinions from January 1, 2005, to December 31, 2005. The supreme court issued four opinions in the area of taxation, and all four decisions related to property tax.

1. *Lake County Property Tax Assessment Board of Appeals v. BP Amoco Corp.*¹⁶⁸—In May of 1999, BP Amoco Corporation ("BP") filed an appeal seeking refund of taxes paid from 1995 to 1999 on its Lake County personal property, which it claimed were "illegal as a matter of law."¹⁶⁹ BP's "specific claim was that the county had 'systematically underassessed property in Lake County to [its] detriment.'"¹⁷⁰ At the time of this appeal, Indiana law only allowed challenges to assessments on this basis, but only in the year of assessment.¹⁷¹ Therefore, the supreme court held that the 1995 through 1998

160. *Id.* § 6-3.1-4-2.5.

161. *Id.* §§ 36-7-13-10.5, -12, -12.1, -13; 36-7-31-12; 36-7-31.3-11.

162. *Id.* § 6-3.1-26-14.

163. *Id.*

164. *Id.* § 6-3.1-26-18.

165. *Id.* § 6-3.1-26-15.

166. *Id.* §§ 6-3.1-26-5.5, -8.

167. *Id.* § 6-3.1-1-3.

168. 820 N.E.2d 1231 (Ind.), *reh'g denied* (Ind. 2005).

169. *Id.* at 1232.

170. *Id.*

171. Procedures for assessment are at IND. CODE § 6-1.1-15-1, and 50 IND. ADMIN. CODE 4.2-

appeals were properly dismissed.¹⁷² BP attempted to appeal the 1995 through 1998 assessments on a “Form 133, Petition for Correction of Error,” which allows an appeal of an assessment within three years of the date the taxes were first due and payable.¹⁷³ Neither the IBTR nor the Tax Court allowed BP to present evidence that the assessment was illegal as a matter of law using Form 133.¹⁷⁴ The property tax authorities dismissed BP’s claim holding that the statute¹⁷⁵ allows retrospective relief on Form 133 if the *taxes* were illegal as a matter of law, but does not entitle relief on Form 133 if the *assessment* was illegal as a matter of law.¹⁷⁶ The Tax Court held that although the claims were not on the proper form, BP was entitled to an administrative hearing to attempt to support the allegations it had claimed on the incorrect forms.¹⁷⁷ The supreme court reversed the Tax Court, resting almost solely on its interpretation of Regulation 3-12.¹⁷⁸ The supreme court cited Regulation 3-12, which “explicitly states that ‘these forms . . . are not to be used to challenge the methodology used in generating an assessment. There are appeal provisions for that purpose.’”¹⁷⁹ The supreme court found that since BP was “clearly challenging the methodology used in generating the assessment of its property”¹⁸⁰ its appeals for taxes paid in 1995 through 1998 were properly dismissed by the property tax authorities.¹⁸¹

2. Lake County Property Tax Assessment Board of Appeals v. U.S. Steel Corp.¹⁸²—U.S. Steel (“USS”) filed for a refund of property taxes it contended had been illegally imposed and overpaid for property taxes payable in 1995 through 1997.¹⁸³ USS filed using Form 133, Petition for Correction of Error and Form 17T, Petition for Refund.¹⁸⁴ USS claimed that local property tax officials had illegally reduced the assessed valuation of all other property in the taxing jurisdiction, therefore improperly imposing an inflated amount of property taxes on USS’s property.¹⁸⁵ The IBTR dismissed USS’s claim for lack of subject matter jurisdiction because the claim involved the county’s tax rate.¹⁸⁶ The Tax Court rejected this view by the IBTR in holding that subject matter jurisdiction existed because the only question was whether Lake County’s reduction of the

3-3 (2005).

172. *Amoco*, 820 N.E.2d at 1232.

173. *Id.* at 1233.

174. *Id.*

175. IND. CODE § 6-1.1-15-12.

176. *Amoco*, 820 N.E.2d at 1233.

177. *Id.*

178. *Id.* at 1234-35 (citing 50 IND. ADMIN. CODE 4.2-3-12).

179. *Id.* at 1235 (quoting 50 IND. ADMIN. CODE 4.2-3-12(a)).

180. *Id.* at 1236.

181. *Id.* at 1237.

182. 820 N.E.2d 1237 (Ind.), *reh’g denied* (Ind. 2005).

183. *Id.* at 1238.

184. *Id.*

185. *Id.*

186. *Id.* at 1239.

assessed value was, as a matter of law, illegal.¹⁸⁷ The supreme court, in affirming in part and reversing in part, agreed that subject matter jurisdiction existed, but disagreed that the appeal by USS was properly filed.¹⁸⁸ The supreme court found that the taxes must be determined illegal as a matter of law in the year of assessment on Form 130.¹⁸⁹ Also, the supreme court agreed that a taxpayer could file a Form 133, Petition for Correction of Error to obtain an adjustment to an assessment or property tax refund only after a timely determination was made that the taxes were, as a matter of law, illegal.¹⁹⁰ Therefore, the supreme court held that dismissal by the IBTR of USS's appeal on Form 133 was proper because USS had not filed a Form 130 in the year of assessment to allow a determination that the taxes were illegal.¹⁹¹

3. *State ex rel. Attorney General v. Lake Superior Court*.¹⁹²—Miller Citizens Corporation (“MCC”) is a group of taxpayers from Lake County who challenged, in Lake Superior Court, the constitutionality of certain statutes passed in 2001 by the General Assembly.¹⁹³ These statutes, which applied only to Lake County, provided for a countywide reassessment to be conducted by the DLGF and private contractors selected by the DLGF.¹⁹⁴ The Lake Superior Court sided with MCC, holding the statutes unconstitutional, and enjoined the taxing authorities in Lake County from sending out the 2003 tax bills, which were already delayed.¹⁹⁵ The Indiana Attorney General filed for a writ of mandamus from the supreme court claiming that exclusive jurisdiction lay with the Tax Court and also filed an appeal of the preliminary injunction on the tax bills.¹⁹⁶ The supreme court stayed the injunction and then held that Lake Superior Court did not have jurisdiction.¹⁹⁷ The supreme court, in recognizing the “broad public interest”¹⁹⁸ in this case, chose to decide the merits of the claims presented.¹⁹⁹ The supreme court held that the statutes did violate “Article IV, Section 22, of the Indiana Constitution as special legislation,”²⁰⁰ but also held that the injunction could not be sought because MCC waited too long to seek this equitable relief.²⁰¹ The

187. *Id.*

188. *Id.* at 1240.

189. *Id.*

190. *Id.*

191. *Id.*

192. 820 N.E.2d 1240 (Ind.), *cert. denied sub nom. Miller Citizens Corp. v. Carter*, 126 S. Ct. 398 (2005).

193. *Id.* at 1243.

194. *Id.*

195. *Id.*

196. *Id.* at 1243-44.

197. *Id.* at 1244.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

supreme court relied solely on its decision in *State v. Sproles*²⁰² in responding to the jurisdictional questions. The supreme court did not agree with MCC's arguments that these laws violated article IV, section 23, article X, section 1, or article I, section 23 of the Indiana Constitution.²⁰³ In analyzing the merits of the special legislation claims made by the MCC, the supreme court held that this was special legislation since Lake County was defined by population parameters in the bill, and the law itself was not rationally related to population and seemed to be derived from the troubled history of property taxation in Lake County.²⁰⁴ The State argued that even if this is special legislation, article IV, section 22²⁰⁵ did not apply since it was written "prohibiting local laws that 'provide for the assessment and collection of taxes.'"²⁰⁶ The supreme court relied on its decision in the *Kinsey*²⁰⁷ case, where the court held that "a law limited to a given county is prohibited unless 'there are inherent characteristics of the affected locale that justify local legislation.'"²⁰⁸ The supreme court found that Lake County's unique conditions of "widespread tax inequities and unusual violations" were enough to satisfy the holding in *Kimsey*.²⁰⁹ The supreme court did not agree, citing the constitutional debates, which the supreme court held made it "clear that lack of uniform assessment practices was one of the principal concerns underlying" both article X, section I and article IV, section 22.²¹⁰ The supreme court held that the laws concerning assessment in Lake County did not violate article IV, section 23 "which requires that 'where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State.'"²¹¹ The supreme court relied on its decision in the *Kimsey*²¹² case, where the court held that "a law limited to a given county is prohibited unless 'there are inherent characteristics of the affected locale that justify local legislation.'"²¹³ The supreme court found that Lake County's unique conditions of "widespread tax inequities and unusual valuations" were enough to satisfy the holding in *Kimsey*.²¹⁴ The supreme court held that these Lake County statutes did not violate article X, section 1, which requires a "uniform and equal rate"²¹⁵ of assessment.²¹⁶ The supreme court rationalized that these statutes only required a different party to conduct the

202. 672 N.E.2d 1353 (Ind. 1996).

203. *Lake Superior Court*, 820 N.E.2d at 1245.

204. *Id.* at 1247-48.

205. IND. CONST. art. IV, § 22.

206. *Lake Superior Court*, 820 N.E.2d at 1248 (quoting IND. CONST. art. IV, § 22).

207. *City of South Bend v. Kinsey*, 781 N.E.2d 683 (Ind. 2003).

208. *Lake Superior Court*, 820 N.E.2d at 1249 (citing *Kinsey*, 781 N.E.2d at 692).

209. *Id.* at 1250.

210. *Id.* at 1248.

211. *Id.* at 1249 (quoting IND. CONST. art. IV, § 23).

212. *City of South Bend v. Kimsey*, 781 N.E.2d 683 (Ind. 2003).

213. *Lake Superior Court*, 820 N.E.2d at 1249 (citing *Kinsey*, 781 N.E.2d at 692).

214. *Id.* at 1250.

215. IND. CONST. art. X, § 1.

216. *Lake Superior Court*, 820 N.E.2d at 1250.

assessment, but that the assessment would be conducted under the same rules as all other county assessments.²¹⁷ These statutes were found not to violate article I, section 23 by the supreme court because the inherent characteristics found for article IV, section 23 were enough to justify the classification under this provision as well.²¹⁸ MCC also claimed that they had a constitutional right to have local officials conduct their assessments, since local officials would better understand the area and the effects of their assessment.²¹⁹ The supreme court did not find a provision of the constitution which guaranteed assessment by locally elected officials.²²⁰ The supreme court also dismissed the article I, section 21, “takings” argument as frivolous and dismissed the MCC’s general arguments questioning the wisdom of the legislation which raised no constitutional issue.²²¹ The supreme court then held that even though this statute was unconstitutional, the General Assembly has since passed “curative legislation” which allows the DLGF to conduct or contract with a private party to conduct assessments in any county.²²² The supreme court found that the “curative legislation” made the 2002 reassessment valid.²²³ In the end, the supreme court held the injunctive relief was improperly granted, both on the basis of laches and on the basis that injunctive relief now would be so inequitably trying for the government, that it could not be justified in this circumstance.²²⁴ The supreme court vacated the preliminary injunction and remanded the case with instructions to dismiss for lack of jurisdiction.²²⁵ Justice Rucker, dissenting in part, disagreed that the “curative legislation” was in fact intended to be curative.²²⁶ He argued that since the legislation in 2004 specifically excluded the section regarding Lake County, it was specifically intended not to cure the 2001 legislation.²²⁷ Justice Rucker also found that the best argument for MCC was that the taxes collected pursuant to these statutes were illegal as a matter of law.²²⁸ Justice Rucker stated that these taxes were illegal as a matter of law since the statutes under which assessment for these taxes took place were unconstitutional.²²⁹

4. *Department of Local Government Finance v. Commonwealth Edison Co. of Indiana*.²³⁰—Commonwealth Edison Co. of Indiana (“Commonwealth”), an electric utility, asked the Indiana state property tax authorities to grant

217. *Id.*

218. *Id.*

219. *Id.* at 1251.

220. *Id.*

221. *Id.*

222. *Id.* at 1252-54.

223. *Id.* at 1254.

224. *Id.* at 1255-56.

225. *Id.* at 1256.

226. *Id.* at 1259 (Rucker, J., concurring and dissenting).

227. *Id.*

228. *Id.*

229. *Id.* at 1260.

230. 820 N.E.2d 1222 (Ind.), *reh'g denied* (Ind. 2005).

Commonwealth property tax relief to its property in Lake County because they claimed residential property owners in Lake County paid less in property taxes than Indiana law required.²³¹ Commonwealth, as basis for its claim, provided a study which showed that the assessed valuation of residential property in Lake County was well below fair market value.²³² The supreme court held that the State property tax authorities properly dismissed Commonwealth's claim because Indiana law at the time of the assessments required that assessed value be based on the property's "true tax value" ("TTV") rather than fair market value ("FMV").²³³ Although this was the main holding in this case, the supreme court decided additional issues relating to Commonwealth's claim. The State argued that Commonwealth could not seek the relief of an "equalization adjustment" because Indiana law only allowed this remedy to be provided to a class of taxpayers.²³⁴ The supreme court, relying on its decision in *Boehm v. Town of St. John*,²³⁵ held that the statutes concerning utility distributable property²³⁶ read together with the statutes for property taxpayers generally²³⁷ did allow Commonwealth to contend that their property taxes were too high due to improper assessment of other property.²³⁸ The supreme court pointed out that in *Town of St. John* the supreme court had allowed taxpayers to appeal their individual assessments to challenge the way all property was being assessed.²³⁹ Commonwealth was therefore entitled to seek this relief.²⁴⁰ Commonwealth next argued that since the State had provided this same relief on the same grounds, the State was precluded from denying these petitions.²⁴¹ The supreme court held that the instances of prior relief were settlements and to preclude denial of relief in this case would chill future settlements.²⁴² The supreme court also pointed to precedent disallowing use of equitable estoppel versus governmental entities.²⁴³ The ISBTC originally denied Commonwealth's adjustments holding that since its equalization studies were based on FMV rather than TTV, the studies were irrelevant.²⁴⁴ Commonwealth provided the studies to show that the ratio of their property's assessed value to the FMV was not uniform when compared with the ratio of other Lake County property's assessed value versus FMV.²⁴⁵ The Tax

231. *Id.* at 1224.

232. *Id.*

233. *Id.*

234. *Id.* at 1225.

235. 675 N.E.2d 318 (Ind. 1996).

236. IND. CODE § 6-1.1-8-30 (2005).

237. *Id.* § 6-1.1-15-1.

238. *Commonwealth Edison*, 820 N.E.2d at 1226.

239. *Id.*

240. *Id.* at 1227.

241. *Id.*

242. *Id.* at 1227-28.

243. *Id.* at 1228.

244. *Id.* at 1229.

245. *Id.*

Court held that Commonwealth was entitled to the adjustments because the equalization studies were sufficient to meet Commonwealth's burden of establishing a *prima facie* case on this issue.²⁴⁶ Although the supreme court acknowledged the arguments against a TTV system, it nevertheless held that TTV was the measuring stick for determining uniformity of assessments at the time of the assessment at issue, and therefore FMV could not be used to measure the uniformity of the assessments in a particular area.²⁴⁷

III. INDIANA TAX COURT DECISIONS

The Tax Court rendered a variety of opinions from January 1, 2005, to December 31, 2005. Specifically, the Tax Court issued twenty-one published opinions, nine of which concerned Indiana real property tax matters. The remaining cases are divided as follows: five cases regarding Indiana sales and use tax; four cases involving income tax matters; two cases involving controlled substances excise tax; and one case involving inheritance tax. Each decision is summarized separately below.

A. Property Tax

1. *Hurricane Food, Inc. v. White River Township Assessor*.²⁴⁸—Hurricane Food, Inc. ("Hurricane") appealed the IBTR's determination valuing its real property for the March 2002 assessment date.²⁴⁹ Hurricane owned a fast food restaurant in Johnson County, and the White River Township Assessor ("Assessor") valued the property at \$634,200 (\$297,300 for the land and \$336,900 for the improvement).²⁵⁰ The improvement was assigned an age of less than one year, a rating of "average," and not adjusted for physical depreciation.²⁵¹ Hurricane filed a Petition for Review of Assessment (Form 130) specifically claiming that the age should have been eight years on the improvement assessment, and the condition rating of "average" entitled Hurricane to a 35% physical depreciation adjustment.²⁵² The Property Tax Assessment Board of Appeals ("PTABOA") made no change to the assessment citing Hurricane's own admission that the purchase price for the property was \$700,000 and finding "th[at] sale price . . . is considered the [property's] best indication of value."²⁵³ Hurricane then appealed to the IBTR, again challenging the age determination. The IBTR denied relief, holding that the assessed value was supported by market

246. *Id.*

247. *Id.* at 1230.

248. 836 N.E.2d 1069 (Ind. Tax Ct. 2005), *reh'g denied sub nom.* P/A Builders & Developers, LLC v. Jennings County Assessor, 842 N.E.2d 899 (Ind. Tax Ct. 2006).

249. *Id.* at 1071.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* (citing Cert. Admin. R. at 52-53).

data.²⁵⁴ Hurricane then appealed to the Tax Court, and Hurricane had the burden to prove invalidity of the determination.²⁵⁵ The Tax Court explained that real property was assessed (during the time at issue in this case) under a “true tax value system.”²⁵⁶ The Tax Court pointed out that this is not market value, but rather market value-in-use.²⁵⁷ The Tax Court then went through the different methods an Assessor may use to arrive at this value.²⁵⁸ The Assessor in this case admittedly used the cost approach and also adjusted the age to arrive at a value closer to the \$700,000 purchase price, which was presumed to be the closest valuation of the market-in-use value.²⁵⁹ The Tax Court reversed the PTABOA, finding that both the Assessor and the IBTR erred in including equipment purchased at \$180,000 in reconciling the current assessment versus the purchase price.²⁶⁰ The value of personal property was held to be separate and distinct from the value of real property.²⁶¹ Therefore the Tax Court held that the reconciliation of the assessment of Hurricane’s improvement should have been compared to the purchase price of only the improvement.²⁶²

2. *Fidelity Federal Savings & Loan v. Jennings County Assessor*.²⁶³—Fidelity Federal Savings & Loan (“Fidelity”) appealed the IBTR’s valuation of Fidelity’s improvement claiming it was too high.²⁶⁴ Fidelity first filed a Form 130 with the Property Tax Assessment Board of Appeals.²⁶⁵ PTABOA did not alter the assessment following Fidelity’s appeal.²⁶⁶ Fidelity’s main claim was that they were entitled to a reduction of \$10 per square foot for the assessment since the building on the property was without partitions.²⁶⁷ Fidelity then filed with the IBTR, again claiming the negative interior partitioning adjustment, and the IBTR also denied relief.²⁶⁸ Fidelity had the burden of proving that the IBTR’s determination was invalid.²⁶⁹ The Tax Court discussed the different methods of assessment used to arrive at the true tax value or market value-in-use.²⁷⁰ The Tax Court reversed the IBTR, holding that Fidelity presented the *prima facie* evidence needed to shift the burden to the Assessor to rebut that

254. *Id.*

255. *Id.* at 1072.

256. *Id.*

257. *Id.*

258. *Id.* at 1072-73.

259. *Id.* at 1073-74.

260. *Id.* at 1075.

261. *Id.*

262. *Id.*

263. 836 N.E.2d 1075 (Ind. Tax Ct. 2005).

264. *Id.* at 1078.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.* at 1079.

270. *Id.*

evidence,²⁷¹ even though the Assessor did present rebuttal evidence about the sales price of a property which was vacant, remodeled, and sold as a bank.²⁷² The Tax Court held that the Assessor made only conclusions and presented no real evidence as to the actual similarities of the remodeled property and Fidelity's property.²⁷³ The Tax Court also held that the Assessors are held to the same standard that taxpayer's are held in presenting evidence which walks "the Court through every element of" the relevant analysis.²⁷⁴

3. *Kooshtard Property VI, LLC v. White River Township Assessor*.²⁷⁵—Kooshtard Property VI ("Kooshtard") challenged the IBTR's valuation of Kooshtard's improvement.²⁷⁶ Kooshtard claimed that its gas station, which was constructed in 1983 and remodeled in 1995 should have received a 37% physical depreciation adjustment rather than a 9% adjustment.²⁷⁷ Kooshtard claimed that the Assessor erred in computing the effective age of the gas station at three years rather than seventeen years.²⁷⁸ The Assessor rebutted this claim by arguing that Kooshtard's computation of effective age at seventeen years does not take into account the remodeling improvements in 1995 and that Kooshtard's methodology does not arrive at the true tax value or market value-in-use of the property.²⁷⁹ The Tax Court agreed with the Assessor that Kooshtard had taken into account neither the remodeling improvements that took place in 1995 nor the possible need for a "tweak" in the assessment by the Assessor to better reflect the 2001 purchase price of the gas station.²⁸⁰ Therefore the Tax Court held that by accounting for these factors Kooshtard had failed to present its prima facie case that the assessment was in error.²⁸¹

4. *Ennis v. Department of Local Government Finance*.²⁸²—Frank Ennis ("Ennis") challenged the DLGF's valuation of his Lake County residence for the 2002 tax year.²⁸³ The IBTR conducted a hearing in November 2004 and Ennis did not appear.²⁸⁴ The IBTR then sent a letter to Ennis requesting a showing of why he did not appear and why his appeal should not be dismissed.²⁸⁵ Ennis responded that his mail was sometimes mixed up with a neighbor's and that he did not receive the notice of hearing until December, and he requested a new

271. *Id.* at 1082-83.

272. *Id.* at 1082.

273. *Id.*

274. *Id.*

275. 836 N.E.2d 501 (Ind. Tax Ct. 2005).

276. *Id.* at 503.

277. *Id.*

278. *Id.*

279. *Id.* at 505.

280. *Id.* at 506.

281. *Id.*

282. 835 N.E.2d 1119 (Ind. Tax Ct. 2005).

283. *Id.* at 1120.

284. *Id.* at 1121.

285. *Id.*

hearing date.²⁸⁶ The IBTR denied his appeal on the merits for failure to appear and present evidence to support the allegation of error in assessment.²⁸⁷ Ennis requested an evidentiary hearing in front of the Tax Court.²⁸⁸ Ennis claimed that the IBTR violated his right to due process by dismissing his claim when he did not receive the notice of hearing until after the hearing occurred.²⁸⁹ The Tax Court disagreed and denied Ennis's request for an evidentiary hearing.²⁹⁰ The Tax Court held that the IBTR did not abuse its discretion in dismissing the appeal.²⁹¹ The Tax Court also held that a timely notice sent "through the regular course of mail" is presumptively timely received, and Ennis conceded to timely mailing in his letter and did not present enough evidence to rebut the presumption that the notice was timely received.²⁹²

5. *Howser Development LLC v. Vienna Township Assessor*.²⁹³—Howser Development LLC ("Howser") appealed the Vienna Township Assessor's ("Assessor") decision not to apply the "development discount"²⁹⁴ to Howser's land.²⁹⁵ Howser originally purchased fourteen acres, but was subdividing the land as buyers were found.²⁹⁶ The Assessor during the 2002 reassessment changed the classification of the land from agricultural to commercial.²⁹⁷ Although the Property Tax Assessment Board of Appeals adjusted the assessment as a result of Howser's appeal, they did not change this classification.²⁹⁸ Howser then appealed to the IBTR on Form 131, but the IBTR upheld the PTABOA's decision.²⁹⁹ Howser next appealed to the Tax Court and claimed that under Indiana Code section 6-1.1-4-12's developer discount provision, the land in question should not have been reassessed until there was a change in title.³⁰⁰ The statute³⁰¹ says that land

must be reassessed upon the occurrence of any of three events: when land is subdivided into lots, when land is rezoned, or when land is put to a different use. The statute, however, also provides an exception to the rule: if the land is subdivided into lots *only*, the reassessment may not

286. *Id.*

287. *Id.*

288. *Id.* at 1122.

289. *Id.*

290. *Id.* at 1123.

291. *Id.*

292. *Id.*

293. 833 N.E.2d 1108 (Ind. Tax Ct. 2005).

294. Under IND. CODE § 6-1.1-4-12 (2005).

295. *Howser Dev.*, 833 N.E.2d at 1108.

296. *Id.* at 1109.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.* at 1110.

301. IND. CODE § 6-1.1-4-12 (2005).

occur until the next assessment date following a change in title to the land. This exception is commonly referred to as the “developer’s discount.”³⁰²

The Assessor argued that the discount did not apply because the land was not subdivided into lots, and the land was rezoned.³⁰³ Howser argued that although the land was not subdivided and was rezoned that the Tax Court’s decision in *Aboite Corp. v. State Board of Tax Commissioners*³⁰⁴ showed that Howser was within the intent for which the discount was provided.³⁰⁵ The Tax Court in *Aboite* stated that this discount was meant to encourage developers to buy farmland, subdivide, and resell, and until the lots are sold the owner is able to reap the rewards of a lower assessment.³⁰⁶ Howser argued that it only differed from *Aboite* in that it was subdividing as it found buyers and not in advance.³⁰⁷ The Tax Court disagreed and affirmed the IBTR’s valuation of Howser’s property.³⁰⁸ The Tax Court found that Howser was ignoring the fact that the land was also rezoned, so if exceptions were permitted, the Tax Court would itself be ignoring two requirements of the statute.³⁰⁹ Also, the Tax Court found that in *Aboite*, although legislative intent was used to inform in that case, the final decision to disallow the discount rested solely on a straightforward application of the statutory exception.³¹⁰

6. *Shoopman v. Clay Township Assessor*.³¹¹—Paul Shoopman (“Shoopman”) appealed the determination of the IBTR for the valuation of his real property for the March 1, 1995, assessment date.³¹² Shoopman argued that the IBTR erred in giving his home an “A+6” grade factor; rating his homesite land as “excellent”; and valuing the residual acreage as “residential excess.”³¹³ Shoopman owned more than 100 acres in Hamilton County, and his home was located on the land.³¹⁴ The Tax Court pointed out that his home was “complete with an indoor swimming pool, movie theatre, and bowling alley[,] a boathouse, and several barns.”³¹⁵ The land was assessed at more than \$730,000 and the home was assessed at more than \$1.4 million.³¹⁶ Shoopman’s petition filed with

302. *Howser Dev.*, 833 N.E.2d at 1110 (citing IND. CODE § 6-1.1-4-12).

303. *Id.*

304. 762 N.E.2d 254 (Ind. Tax Ct. 2001).

305. *Howser Dev.*, 833 N.E.2d at 1110.

306. *Id.* (citing *Aboite Corp.*, 762 N.E.2d at 257).

307. *Id.*

308. *Id.* at 1111.

309. *Id.*

310. *Id.*

311. 827 N.E.2d 662 (Ind. Tax Ct.), *review granted*, 841 N.E.2d 183 (Ind. 2005).

312. *Id.* at 663.

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

the IBTR claimed that his home should be “A+1”, the homesite rated as “good,” and the excess acreage should be classified as agricultural excess.³¹⁷ A hearing office for the IBTR made recommendations in line with the claimed adjustments asked for by Shoopman, but the IBTR rejected the recommendations and did not adjust the assessment in its final determination.³¹⁸ Shoopman appealed to the Tax Court, and the Clay Township Assessor (“Assessor”) did not respond to Shoopman’s arguments but rather asked that the Tax Court dismiss the case because the petition for judicial review was not timely filed and therefore the Tax Court lacked jurisdiction over the particular case.³¹⁹ The Tax Court held that the Assessor had waived the lack of jurisdiction argument because it was not raised at the earliest opportunity possible.³²⁰ The Tax Court found that when the Assessor made a motion in December 2003 to dismiss improper parties, the motion to dismiss for lack of jurisdiction as to Shoopman should have been raised at that time.³²¹ The Tax Court further held that the Assessor’s lack of response to any of Shoopman’s arguments is “akin to failure to file a brief.”³²² Therefore, the Tax Court held that if Shoopman showed the prima facie case that an error was made, this was enough to reverse the IBTR’s determination.³²³ The Tax Court held that Shoopman’s evidence that the IBTR ignored the recommendations of its hearing officer was a prima facie showing of error, and therefore the Tax Court remanded the case for the IBTR to value the land as the hearing officer recommended.³²⁴

7. Knox County Property Tax Assessment Board of Appeals v. Grandview Care, Inc.³²⁵—Knox County Property Tax Assessment Board of Appeals appealed the IBTR’s determination to grant Grandview Care, Inc. (“Grandview”) a property tax exemption for its BridgePointe nursing home (“BridgePointe”), specifically the IBTR’s holding that Bridgepointe qualified for the charitable purposes exemption under Indiana Code section 6-1.1-10-16.³²⁶ BridgePointe is a nursing home in Vincennes with ninety-eight residents, and although they charge a monthly fee, they do not turn anyone away because they cannot pay the fee.³²⁷ Grandview has also been classified by the Internal Revenue Service as a 501(c)(3) organization, and all BridgePointe residents must be at least fifty-five years old and/or mentally or physically disabled.³²⁸ Grandview contracted with Trilogy Health Services, LLC (“Trilogy”), a for-profit company, to operate

317. *Id.* at 664.

318. *Id.*

319. *Id.* at 665.

320. *Id.* at 666.

321. *Id.*

322. *Id.* (citing *Hacker v. Holland*, 575 N.E.2d 675, 676 (Ind. Ct. App. 1991)).

323. *Id.* at 667.

324. *Id.*

325. 826 N.E.2d 177 (Ind. Tax Ct. 2005).

326. *Id.* at 179.

327. *Id.* at 179-80.

328. *Id.* at 179 n.1 & n.2.

BridgePointe for a monthly fee of \$17,000.³²⁹ Trilogy was responsible for paying payroll, paying operating expenses, personnel matters, maintenance of buildings, etc.³³⁰ Trilogy paid the payroll and operating expenses from Grandview's accounts as an authorized signatory.³³¹ PTABOA denied the charitable exemption, holding that the contract with Trilogy made BridgePointe a for-profit operation.³³² The IBTR held that since the purpose of BridgePointe is to provide housing and care to the elderly, which has been held by the Tax Court to be a charitable purpose, then Grandview is entitled to the charitable exemption whether it manages the BridgePointe facility itself or contracts with a management company.³³³ PTABOA appealed to the Tax Court, claiming that the IBTR's determination was in error for three reasons.³³⁴ Indiana Code section 6-1.1-10-16 provides "[a]ll or part of a building is exempt from property taxation if it is owned, occupied, and used . . . for educational, literary, scientific, religious or charitable purposes."³³⁵ PTABOA claimed that Grandview was not affiliated with a religious organization, so there was "lack of an identifiable charity."³³⁶ Next PTABOA claimed that Grandview may have owned, but did not "occupy" or "use" the property as required by the statute.³³⁷ Lastly, PTABOA claimed that Grandview and Trilogy were operating this nursing home to generate a profit, which was clearly outside the intent of the exemption.³³⁸ The Tax Court dismissed the first argument, holding that BridgePointe need only be owned, occupied, and used for a charitable purpose, and that neither BridgePointe nor Grandview were required to be affiliated with a religious organization to be entitled to the exemption.³³⁹ Furthermore the Tax Court found that "Indiana courts have long recognized that providing care and comfort to the aged constitutes a charitable purpose."³⁴⁰ The Tax Court also disagreed with the second argument set forth by PTABOA, holding that the entire building need not be solely occupied, owned, and used by Grandview, but,

[s]tated differently: a piece of property must be owned for charitable purposes; a piece of property must be occupied for charitable purposes; a piece of property must be used for charitable purposes. Once these three elements have been met, regardless of by whom, the property can

329. *Id.* at 180.

330. *Id.*

331. *Id.* at 180 n.3.

332. *Id.* at 180.

333. *Id.*

334. *Id.* at 181.

335. *Id.* (quoting IND. CODE § 6-1.1-10-16 (2005)).

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.* at 181-82.

340. *Id.* at 182.

be exempt from taxation.³⁴¹

The Tax Court therefore held that BridgePointe was indeed owned, used, and occupied for a charitable purpose.³⁴²

The Tax Court then addressed PTABOA's third argument of profit motive.³⁴³ The Tax Court found that PTABOA presented no probative evidence on this issue, but simply alerted the Tax Court to the fees paid to Trilogy and claimed a for-profit purpose on that fact, along with other unproven allegations.³⁴⁴ The Tax Court held that "charitable" does not have to equal "free," and without evidence to support a profit motive BridgePointe was considered to be operated for a charitable purpose.³⁴⁵ The Tax Court affirmed the determination of the IBTR that Grandview was entitled to the charitable property tax exemption.³⁴⁶

8. *Wal Mart Stores, Inc. v. Wayne Township Assessor*.³⁴⁷—Wal Mart Stores, Inc. ("Wal Mart") appealed the valuation by the Wayne Township Assessor ("Assessor") of Wal Mart's property for the 2001 tax year, and Wal Mart claimed that its improvements were entitled to obsolescence depreciation.³⁴⁸ In Richmond, Wal Mart constructed a new supercenter directly behind its old store with plans to demolish the old store as soon as the new store was ready for business. Since both stores were still standing on March 1, 2001, the assessor assessed the new store at over \$5.6 million and the old store at over \$2.8 million.³⁴⁹ The Property Tax Assessment Board of Appeals ("PTABOA") upheld both assessments.³⁵⁰ Wal Mart in appealing to the IBTR claimed that the old store should receive a 95% obsolescence adjustment since it was demolished thirteen days after the assessment, and Wal Mart also claimed that the new store should receive a 25% obsolescence adjustment since it opened for business thirteen days after the assessment.³⁵¹ The IBTR denied an obsolescence adjustment for either building.³⁵²

The Tax Court first stated that "[o]bsolescence, which is a form of depreciation, is defined as a loss of [property] value and classified as either functional or economic."³⁵³ Wal Mart was required to show the causes of the

341. *Id.* at 183 (internal quotation marks omitted) (quoting *Sangrilea Boys Fund, Inc. v. State Bd. of Tax Comm'rs*, 686 N.E.2d 954, 959 (Ind. Tax Ct. 1997)).

342. *Id.* at 184.

343. *Id.*

344. *Id.* at 184-85.

345. *Id.* at 185.

346. *Id.*

347. 825 N.E.2d 485 (Ind. Tax Ct. 2005).

348. *Id.* at 486.

349. *Id.* at 486-87.

350. *Id.* at 487.

351. *Id.*

352. *Id.*

353. *Id.* (internal quotation marks omitted and second alteration in original) (quoting *Freudenberg-NOK Gen. P'ship v. State Bd. of Tax Comm'rs*, 715 N.E.2d 1026, 1029 (Ind. Tax

alleged obsolescence and also quantify the amount of obsolescence to be applied to the property.³⁵⁴ Wal Mart had to show actual loss of value, which the Tax Court stated, usually means loss of income generating ability, in a commercial context.³⁵⁵ The Tax Court held that although Wal Mart may have had a meritorious claim, they did not show through probative evidence the actual loss in value, and therefore were not entitled to the adjustment.³⁵⁶ The Tax Court found that merely stating that the store was obsolete because it was going to be demolished and therefore should get the 95% adjustment was “fatally deficient.”³⁵⁷

The Tax Court also found that Wal Mart had not made a sufficient showing as to the entitlement of an obsolescence adjustment for the new store.³⁵⁸ The Tax Court held that just because the building is empty or under construction does not in and of itself show a loss in actual value, and furthermore, a loss of value could not be shown by this evidence since the building’s “useful life had not yet begun.”³⁵⁹ For these reasons the Tax Court denied Wal Mart’s request for the obsolescence adjustments and affirmed the decision of the IBTR.³⁶⁰

9. *Long v. Wayne Township Assessor*.³⁶¹—William and Dorothy Long (“the Longs”) appealed the valuation of their property for the March 1, 2002, assessment date.³⁶² The Longs owned an apartment building in Indianapolis, which was assessed at \$87,800 (\$5400 of land, and \$82,400 improvement).³⁶³ The Longs believed the assessment was too high and appealed to the IBTR who affirmed the assessment.³⁶⁴ The Longs filed an appeal with the Tax Court and both they and the IBTR, filed cross-motions for summary judgment.³⁶⁵ The Longs’ only contention was that the IBTR ignored evidence that the assessed value of their property far exceeded the market value.³⁶⁶ The Wayne Township Assessor (“Assessor”) claimed that the Longs’ evidence had no probative value and therefore the Longs failed to make the required *prima facie* showing of invalidity.³⁶⁷ The Longs submitted 200 pages of documentation of comparable properties with sales prices, a policy declaration from Auto-Owners Insurance showing the property was insured for \$56,000 for 2003-2004, and an independent

Ct. 1999)); *see also* 50 IND. ADMIN. CODE 2.2-10-7(e) (1996).

354. *Wal Mart Stores, Inc.*, 825 N.E.2d at 488.

355. *Id.*

356. *Id.* at 488-89.

357. *Id.*

358. *Id.* at 489.

359. *Id.*

360. *Id.* at 490.

361. 821 N.E.2d 466 (Ind. Tax Ct.), *trans. denied*, 831 N.E.2d 750 (Ind. 2005).

362. *Id.* at 467.

363. *Id.* at 468.

364. *Id.*

365. *Id.*

366. *Id.* at 468-69.

367. *Id.* at 469.

appraisal of the property from 2003.³⁶⁸ The Tax Court stated that

a taxpayer must offer probative evidence regarding the market value-in-use of the subject property, as well as the market value-in-use of comparable properties. For instance, a taxpayer's evidence may include "actual construction costs, sales information regarding the subject or comparable properties, appraisals that are relevant to the market value-in-use of the property, and any other information compiled in accordance with generally accepted appraisal principles." Nevertheless, such data must be reliable, reasonably comparable based on accepted appraisal standards, readily available to the assessor at the time the assessment was made, and reflect the property's January 1, 1999, replacement cost.³⁶⁹

The Tax Court held that the Longs had not met their burden of proof.³⁷⁰ The Tax Court found that although the 200 pages of listings were a good start, the Longs erred in presenting their evidence to the IBTR by failing to show how these listed properties specifically compared to the subject property.³⁷¹ The Tax Court held that mere statements that the property was similar or comparable were nothing but conclusions.³⁷² The Longs claimed that their evidence as a whole was enough of a showing to allow the IBTR to make the needed comparisons, but the Tax Court dismissed this argument and held that "[i]t is the taxpayer's duty to walk the [Indiana Board and this] Court through every element of [its] analysis."³⁷³ The Tax Court also held that the Longs' evidence of the insurance and the appraisal were also not probative since the Longs failed to explain why these values were relevant to the subject property's value as of January 1, 1999 (the time at issue).³⁷⁴ Therefore, the Tax Court granted summary judgment for the Assessor and affirmed the IBTR's determination.³⁷⁵

B. Sales and Use Tax

1. *Haas Publishing Co. v. Indiana Department of State Revenue*.³⁷⁶—Haas Publishing Company ("Haas") appealed the IDSR's assessment of use tax for 1998 through 2000 on its production costs, which Haas claimed were exempt because its publication was a "free distribution newspaper" under Indiana Code

368. *Id.* at 470.

369. *Id.* at 469-70 (citing 2002 REAL PROPERTY ASSESSMENT MANUAL 2 (2001)).

370. *Id.* at 470.

371. *Id.*

372. *Id.*

373. *Id.* (internal quotation marks omitted and alteration in original) (quoting *Clark v. Dep't of Local Gov't Fin.*, 779 N.E.2d 1277, 1282 n.4 (Ind. Tax Ct. 2002)).

374. *Id.* at 471-72.

375. *Id.* at 472.

376. 835 N.E.2d 235 (Ind. Tax Ct. 2005), *trans. denied* (Ind. 2006).

section 6-25-5-31.³⁷⁷ Haas is a Delaware corporation with its principal place of business in New York.³⁷⁸ Haas published and distributed, free of charge, apartment guides for various cities throughout the United States.³⁷⁹ These apartment guides were put in racks and dispensers for people to take free of charge at many stores and other facilities throughout the areas covered by the apartment guides.³⁸⁰ The guides were published once a month with a consistent layout and numerous advertisements per issue.³⁸¹ The IDSR assessed use tax on the printing, equipment, and materials for the years at issue.³⁸²

Haas had to prove that statutory exemption requirements were met.³⁸³ The Tax Court standard was to construe the exemption language against the taxpayer, but not so narrowly as to defeat application of the exemption.³⁸⁴ The exemption in question applied to production costs incurred in publication of a free distribution newspaper.³⁸⁵ The IDSR claimed this guide was not a free

377. *Id.* at 235.

378. *Id.*

379. *Id.* at 236.

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. *Haas Publ'g*, 835 N.E.2d at 236.

385. *Id.* at 237 (citing IND. CODE § 6-2.5-5-31 (2005)).

Sec. 31. (a) As used in this section, a "free distribution newspaper" means any community newspaper, shopping paper, shoppers' consumer paper, pennysaver, shopping guide, town crier, dollar stretcher, or other similar publication which:

- (1) is distributed to the public on a community-wide basis, free of charge;
- (2) is published at stated intervals of at least once a month;
- (3) has continuity as to title and general nature of content from issue to issue;
- (4) does not constitute a book, either singly or when successive issues are put together;
- (5) contains advertisements from numerous unrelated advertisers in each issue;
- (6) contains news of general or community interest, community notices, or editorial commentary by different authors, in each issue; and
- (7) is not owned by, or under the control of, the owners or lessees of a shopping center, a merchant's association, or a business that sells property or services (other than advertising) whose advertisements for their sales of property or services constitute the predominant advertising in the publication.

(b) The term "free distribution newspaper" does not include mail order catalogs or other catalogs, advertising fliers, travel brochures, house organs, theater programs, telephone directories, restaurant guides, shopping center advertising sheets, and similar publications.

(c) Transactions involving manufacturing machinery, tools and equipment, and other tangible personal property are exempt from the state gross retail tax if the person acquiring that property acquires it for his direct use, or for his direct consumption as a material to be consumed, in the direct production or publication of a free distribution

distribution newspaper because it failed to meet three of the criteria listed in Indiana Code section 6-2.5-5-31(a).³⁸⁶ Specifically, the IDSR claimed that the advertisers in the guides were related, the guides were books, and the guides did not publish community notices.³⁸⁷ The Tax Court found that in defining free distribution newspaper in the statute, the legislature did not require that the publication had to be what is commonly understood to be a “newspaper.”³⁸⁸ The Tax Court found that no definition of “book” existed in the statute, and that the dictionary meanings were inconsistent.³⁸⁹ The Tax Court therefore looked to case law to determine whether the guide was a book.³⁹⁰ The Tax Court held that because the guides were not “complete in themselves” and that even if a series of successive issues were read together, they would still not be a complete publication, the guides were not books.³⁹¹

The Tax Court next held that the advertisers in the guide were not related because they were not under common ownership which was stipulated by the parties.³⁹² The Tax Court rejected the IDSR’s argument that the advertisers were related because the advertising itself was related.³⁹³ Haas disputed the IDSR’s third argument concerning community notices, claiming the guides contained many such notices including maps, information for newcomers, identification information for apartment showings, utility companies, and other services.³⁹⁴ The IDSR asserted that community notices meant legal notices under the statute when read in conjunction with Indiana Code section 5-3-1-0.7.³⁹⁵ The Tax Court rejected this argument because the two statutes referred to by the IDSR were not identical, were fourteen years apart, and made no mention that community notice equated to legal notice.³⁹⁶ The Tax Court therefore reversed the IDSR and granted Haas the exemption.³⁹⁷

2. *Miller Brewing Co. v. Indiana Department of State Revenue.*³⁹⁸—Miller

newspaper, or for incorporation as a material part of a free distribution newspaper published by that person.

(d) Transactions involving a sale of a free distribution newspaper, or of printing services performed in publishing of a free distribution newspaper, are exempt from the state gross retail tax if the purchaser is the publisher of the free distribution newspaper.

IND. CODE § 6-2.5-5-31.

386. *Id.*

387. *Id.*

388. *Id.* at 238.

389. *Id.* at 239.

390. *Id.*

391. *Id.* at 240.

392. *Id.*

393. *Id.* at 241.

394. *Id.*

395. *Id.* at 241-42 (citing IND. CODE § 6-2.5.5-31(a)(6) (2005)).

396. *Id.* at 242.

397. *Id.* at 243.

398. 831 N.E.2d 859 (Ind. Tax Ct.), *reconsideration denied*, 836 N.E.2d 498 (Ind. Tax Ct.

Brewing Company ("Miller") filed a summary judgment motion claiming that Miller's sales of products that were transported to Indiana purchasers by common carrier were not made in Indiana and therefore were not subject to Indiana adjusted gross income tax.³⁹⁹ Miller is a Wisconsin corporation, and Miller sold products to customers in many states including Indiana.⁴⁰⁰ The Indiana customers submitted purchase orders to Miller's headquarters in Milwaukee, and the products were prepared for pick up at one of Miller's breweries.⁴⁰¹ Miller's customers had three options:

- (1) they could pick up the products themselves using their own trucks;
- (2) they could arrange for a third-party common carrier to pick up the products and transport them; or (3) Miller could arrange for a common carrier to transport the products and the customers would reimburse Miller for the related charges. Regardless, the customers decided how to transport the goods as possession and title of the products transferred to them at the breweries.⁴⁰²

Miller originally included all of the sales to Indiana customers in its adjusted gross income calculation.⁴⁰³ Miller then filed for a refund for the sales where the customers either picked up from Milwaukee or used a common carrier.⁴⁰⁴ The IDSR refunded the amounts for the sales to Indiana customers who picked up the goods in Milwaukee, but denied the refund as to the sales involving common carrier shipment.⁴⁰⁵ Miller then withdrew his claim for the sales where Miller arranged the common carrier shipment, and challenged only the sales where the Indiana customers arranged for common carrier shipment.⁴⁰⁶

The IDSR argued that since the recipients were in Indiana, the sales were in this state.⁴⁰⁷ The IDSR relied on the statutes and regulations involved, which they claimed emphasized the location of the recipient.⁴⁰⁸ The Tax Court held that since the customers contracted with the common carrier, the customers accepted delivery of the goods in Milwaukee.⁴⁰⁹ The Tax Court reasoned that the common carrier, contracted by the customer, stood in the customer's shoes to accept delivery.⁴¹⁰ The Tax Court held that Miller did not need to include these sales in the numerator of their sales factor for the apportionment of income to Indiana,

2005).

399. *Id.* at 859-60.

400. *Id.* at 860.

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.* at 861.

408. *Id.* (citing 45 IND. ADMIN. CODE 3.1-1-53 (1) (2005); IND. CODE § 6-3-2-2 (2005)).

409. *Id.* at 862.

410. *Id.*

and therefore were entitled to a refund.⁴¹¹

3. *Carnahan Grain, Inc. v. Indiana Department of State Revenue*.⁴¹²—*Carnahan Grain, Inc.* (“Carnahan”) appealed the assessment of additional sales and use tax by the IDSR for the 1999 and 2000 tax years.⁴¹³ Carnahan claimed that it was entitled to a public transportation exemption for equipment it predominantly used to transport tomatoes owned by third parties.⁴¹⁴ Carnahan also transports goods of its own with this equipment.⁴¹⁵ The IDSR assessed use tax on the semi-tractors, flatbed trailers, tubs and containers, repair parts and supplies for the trucks, fuel, a grader, and a skid loader.⁴¹⁶ The exemption at issue provided that property acquired for use in providing public transportation for persons or property is exempt from sales tax.⁴¹⁷ Public transportation is defined as moving, transporting, or carrying persons or property for consideration.⁴¹⁸ The taxpayer must be predominantly transporting goods of another to receive the exemption.⁴¹⁹ The IDSR argued that Carnahan, although transporting goods for others, was not engaged in transporting these goods as a primary business, and therefore was not entitled to the exemption.⁴²⁰

The IDSR relied on the Tax Court’s decision in *Panhandle Eastern Pipeline Co. v. Indiana Department of State Revenue*,⁴²¹ in which the Tax Court required that the IDSR look at both the use of the property and the business of the taxpayer as a whole.⁴²² The Tax Court disagreed with the IDSR’s interpretation, and cited *Indiana Waste*⁴²³ and *Calcar*⁴²⁴ to show when an examination of a taxpayer’s business is relevant in these types of cases.⁴²⁵ The Tax Court held that the business of the taxpayer is only relevant to determine whether, in proportion to the taxpayer’s transporting of goods, the taxpayer is transporting predominantly the goods of others as opposed to goods the taxpayer owns.⁴²⁶ Therefore, the Tax Court held that “because Carnahan predominantly used the property at issue for transporting agricultural commodities owned by third

411. *Id.* at 863.

412. 828 N.E.2d 465 (Ind. Tax Ct. 2005).

413. *Id.* at 466.

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.* at 467 (citing IND. CODE § 6-2.5-5-27 (2005)).

418. *Id.* (citing 45 IND. ADMIN. CODE 2.2-5-61 (2005)).

419. *Id.*

420. *Id.*

421. 741 N.E.2d 816, 819 (Ind. Tax Ct. 2001).

422. *Carnahan Grain*, 828 N.E.2d at 468.

423. *Ind. Waste Sys. of Ind., Inc. v. Ind. Dep’t of State Revenue*, 644 N.E.2d 960 (Ind. Tax Ct. 1994).

424. *State, Dep’t of Revenue v. Calcar Quarries, Inc.*, 394 N.E.2d 939 (Ind. App. 1979).

425. *Carnahan Grain*, 828 N.E.2d at 468-49.

426. *Id.* at 469.

parties, it [was] entitled to the public transportation exemption.”⁴²⁷

4. *Galligan v. Indiana Department of State Revenue*.⁴²⁸—Thomas Galligan (“Galligan”) appealed the IDSR, which assessed Galligan with the sales and use tax liabilities of Irish Park, Inc. (“IP”) for 1993, 1994, and 1995.⁴²⁹ Galligan claimed that collecting IP’s tax liabilities from Galligan violated his due process rights, and Galligan also claimed the IDSR erred in imposing sales tax on certain IP transactions.⁴³⁰ Galligan founded IP, but resigned in 1996 after becoming Mayor of Jeffersonville.⁴³¹ The IDSR audited IP and assessed the sales and use tax IP owed for the years at issue, but before the IDSR could collect, IP liquidated.⁴³² The IDSR then, under the “responsible officer statute”⁴³³ attempted to collect the liabilities from Galligan.⁴³⁴ The statute provides that an officer of a company that is a retail merchant can be held personally liable for the taxes, penalties, and interest which are liabilities of the company.⁴³⁵

Galligan claimed that his due process rights were violated because he did not receive proper notice of the assessment against IP and when he finally did receive notice, he was no longer an officer at IP, and no longer had access to documents or files from the liquidated company which were necessary to challenge the assessment.⁴³⁶ The Tax Court stated that adequate notice is “‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’”⁴³⁷ The Tax Court first reversed the IDSR’s assessment of the 1993 liability against Galligan because the statute of limitations for imposing an assessment was three years from the end of the calendar year for which the return is filed.⁴³⁸ Because Galligan did not receive notice of the IDSR’s assessment against him for 1993 until October 1997, the statute of limitations had run.⁴³⁹ The Tax Court presumed that when IP received notice in 1996, Galligan did not receive personal notice of the assessed liability.⁴⁴⁰

The Tax Court held that Galligan’s due process rights were not violated for the 1994 and 1995 assessments because he was an officer of the company during those years and was presumed to have the duty to remit the taxes.⁴⁴¹ The Tax

427. *Id.*

428. 825 N.E.2d 467 (Ind. Tax Ct.), *trans. denied*, 841 N.E.2d 180 (Ind. 2005).

429. *Id.* at 471.

430. *Id.* at 471-72.

431. *Id.* at 472.

432. *Id.*

433. IND. CODE § 6-2.5-9-3 (2005).

434. *Galligan*, 825 N.E.2d at 472.

435. *Id.*

436. *Id.* at 473.

437. *Id.* at 472 (quoting *Ball v. Ind. Dep’t of State Revenue*, 563 N.E.2d 522, 524 (Ind. 1990)).

438. *Id.* at 473 (citing IND. CODE § 6-8.1-5-1 (2005)).

439. *Id.* at 473-74.

440. *Id.* at 473.

441. *Id.* at 474.

Court found that Galligan was not required to have personal notice during the audit or even before his resignation because during 1994 and 1995 he was a responsible officer and therefore presumed to be on notice of his personal liability under statute.⁴⁴²

The Tax Court then examined the specific portions of the audit assessment which Galligan claimed were in error.⁴⁴³ The Tax Court reversed the IDSR's assessment on delivery charges for dirt, sand, and rock.⁴⁴⁴ The IDSR assessed these items because the invoices merely listed the items as "1 ton of sand" which the IDSR believed to be the sale of an item which is sales taxable.⁴⁴⁵ Galligan claimed that these items were merely charges for delivery of dirt from other excavations which were never purchased for resale, and therefore exempt from sales tax.⁴⁴⁶ The Tax Court sided with Galligan, because the IDSR did not rebut these allegations but merely claimed that more evidence was needed.⁴⁴⁷ The Tax Court held that Galligan had made his *prima facie* showing since he was a responsible officer with personal knowledge, and therefore the IDSR needed to rebut this evidence rather than simply ask for more proof from Galligan.⁴⁴⁸

Galligan then claimed the IDSR erred in assessing sales tax on delivery charges because a common carrier essentially delivered the items through IP with F.O.B. at the final destination.⁴⁴⁹ Because title never passed to IP, Galligan argued, these delivery charges were not taxable.⁴⁵⁰ Because the IDSR again did not rebut this testimony but simply asked for more proof, the Tax Court held that the delivery charges were incurred as Galligan testified and therefore were not taxable.⁴⁵¹

The Tax Court then reversed the IDSR's assessment of use tax for items on which Galligan had previously paid sales tax to other states.⁴⁵² The Tax Court reversed even though the IDSR claimed that a taxpayer is only entitled to a credit where the purchase is made in another state and brought back to Indiana.⁴⁵³ The Tax Court held that the statute does not contain this restriction, and the IDSR may not enlarge the power conferred on it by the legislature.⁴⁵⁴

The Tax Court then addressed Galligan's claim that the IDSR erred in assessing use tax on charges for certain services.⁴⁵⁵ The Tax Court addressed

442. *Id.* at 475.

443. *Id.*

444. *Id.* at 476.

445. *Id.*

446. *Id.*

447. *Id.*

448. *Id.* 476-77.

449. *Id.* at 477-78.

450. *Id.* at 478.

451. *Id.*

452. *Id.* at 478-80.

453. *Id.* at 480.

454. *Id.* (citing IND. CODE § 6-2.5-3-5(a) (2005)).

455. *Id.* at 481.

each charge individually, reversing some and affirming some, depending upon whether the charges for services were part of a unitary transaction that would allow taxation under Indiana Code section 6-2.5-4-1.⁴⁵⁶ Galligan also claimed that certain purchases that were assessed tax by the IDSR were purchases that became permanent parts of improvements for tax-exempt organizations.⁴⁵⁷ The Tax Court held that without evidence other than the taxpayer's conclusory statements that these purchases were as claimed, no exemption can be granted.⁴⁵⁸

Galligan's final claim was that the IDSR erred in assessing use tax on items which appeared on IP's depreciation schedules because sales tax had been paid at the time these items were purchased.⁴⁵⁹ Galligan provided invoices from many items not at issue for this claim, attempting to show customs and practices as to sales tax paid at the time of purchase.⁴⁶⁰ The Tax Court affirmed the IDSR's assessment, holding that Galligan was required to provide the actual invoices for these items in order to avoid paying use tax.⁴⁶¹

5. *Carroll County Rural Electric Membership Corp. v. Indiana Department of State Revenue*.⁴⁶²—Carroll County Rural Electric Membership Corporation ("REMC") appealed the determination of the IDSR that the purchase of a trade publication, *The Electric Consumer*, by REMC was subject to the state gross retail (sales) tax.⁴⁶³ REMC claimed that this publication was a newspaper and therefore exempt from sales tax.⁴⁶⁴ The IDSR also claimed that the Tax Court lacked subject matter jurisdiction because REMC did not seek a refund or seek to enjoin the collection of a tax, and therefore did not meet the requirements for an original tax appeal.⁴⁶⁵ The Tax Court previously addressed and dismissed this argument,⁴⁶⁶ and the supreme court declined to address the issue on interlocutory appeal, so the court declined to reconsider the issue.⁴⁶⁷

REMC was a member of the Indiana Statewide Association of Rural Electric Cooperatives ("Statewide").⁴⁶⁸ Statewide was the publisher of *The Electric Consumer*, copies of which REMC purchased and distributed free of charge to its members.⁴⁶⁹ The IDSR in a letter of finding found for REMC on the issue of taxes owed for 1995, 1996, and 1997, but found that going forward, *The Electric*

456. *Id.* at 481-83.

457. *Id.* at 483-84.

458. *Id.* at 484.

459. *Id.* at 484-85.

460. *Id.* at 485.

461. *Id.*

462. 838 N.E.2d 564 (Ind. Tax Ct. 2005).

463. *Id.* at 565.

464. *Id.*

465. *Id.* at 565 n.1.

466. *Id.* (citing *Carroll County REMC v. Ind. Dep't of State Revenue*, 733 N.E.2d 44 (Ind. Tax Ct. 2000)).

467. *Id.*

468. *Id.* at 566.

469. *Id.*

Consumer was no longer going to be considered a newspaper and therefore sales tax would be assessed.⁴⁷⁰ REMC appealed and had the burden of proving that *The Electric Consumer* was a newspaper and exempt from sales tax.⁴⁷¹

The Tax Court listed the following factors for determining if a publication is a newspaper: “(1) commonly understood to be newspapers; (2) circulated among the general public; (3) published at stated short intervals; (4) entered or are qualified to be admitted and entered as second class mail matter at a post office in the county where published; and (5) printed for resale and are sold.”⁴⁷² The IDSR argued that *The Electric Consumer* was not a newspaper because it failed to meet the first three conditions above.⁴⁷³ The Tax Court disagreed and found that the first two conditions were met, and that failure to meet the third condition alone was not enough to disallow the newspaper exemption.⁴⁷⁴ The Tax Court relied on the IDSR’s examples of a newspaper from its own regulations in finding that *The Electric Consumer* was commonly understood to be a newspaper.⁴⁷⁵ The Tax Court found that having less than a preponderance of advertising, authorization to carry legal advertising, and having a masthead which listed the publisher, editor, circulation, and place of publication all taken together showed that *The Electric Consumer* was commonly understood to be a newspaper.⁴⁷⁶ The IDSR disagreed that *The Electric Consumer* was authorized to carry legal advertising, but the Tax Court found that even though *The Electric Consumer* could not carry legal notices under Indiana Code section 5-3-1-0.4, the fact that *The Electric Consumer* was authorized by the Indiana Utility Regulatory Commission to provide notice of REMC rate changes was enough to satisfy this condition.⁴⁷⁷ Also, despite evidence of a memo by the editor referring to *The Electric Consumer* as a magazine and the fact that *The Electric Consumer* is published in color, the Tax Court found this publication to be a newspaper.⁴⁷⁸ The Tax Court next found that the ability for any member of the general public to subscribe to *The Electric Consumer* was enough to satisfy the general circulation requirement.⁴⁷⁹ The IDSR failed in its argument that in reality the subscribers were virtually all members of REMC.⁴⁸⁰ The Tax Court then found that although monthly publication did not point toward *The Electric Consumer* being classified a newspaper, this condition was neutral and, standing alone, was not enough to deny the exemption.⁴⁸¹

470. *Id.*

471. *Id.*

472. *Id.*

473. *Id.* at 567.

474. *Id.* at 567-70.

475. *Id.* at 567 (citing 45 IND. ADMIN. CODE 2.2-5-26(g) (2005)).

476. *Id.*

477. *Id.* at 567-68.

478. *Id.* at 568-69.

479. *Id.* at 569.

480. *Id.*

481. *Id.* at 569-70.

C. Income Tax

1. *Gundersen v. Indiana Department of State Revenue*.⁴⁸²—Joe Gunderson (“Gunderson”) appealed the IDSR’s denial of his claims for refund of income taxes paid in 2000 and 2001.⁴⁸³ The issue for the Tax Court was “whether the statute of limitation that applies to refund claims also applies to [Gunderson’s] request to have excess tax payments applied toward future tax liabilities.”⁴⁸⁴ Because Gunderson filed his returns more than two years after the due date and was past the deadline for refunds in Indiana Code section 6-3-4-8(h), the IDSR denied his claim for refund.⁴⁸⁵ Gunderson then asked that the overpayments be applied to his 2004 liability, and the IDSR, citing the same statute of limitations, denied his claim.⁴⁸⁶ The Tax Court found that the IDSR’s interpretation of the statute, which applied the statute of limitations to refunds as well as credits, was correct.⁴⁸⁷ The Tax Court held that if the statute was applied as Gunderson interpreted it, the statute of limitation would be circumvented and would effectively make part of the statute meaningless.⁴⁸⁸

2. *U-Haul International, Inc. v. Indiana Department of State Revenue*.⁴⁸⁹—U-Haul International (“UHI”) appealed assessment of gross income tax by the IDSR on 100% of certain rental receipts in 1988, 1989, 1993, 1994, and 1995.⁴⁹⁰ UHI is a Nevada Corporation located in Arizona, and is part of the U-Haul System.⁴⁹¹ The system has four groups: “(1) Fleet Owners; (2) Rental Companies; (3) Rental Dealers; and (4) UHI. These four groups are bound together by a series of contractual relationships, with UHI controlling the form, terms, and conditions of each contract.”⁴⁹² UHI receives fees and only fees from the other three groups for its services.⁴⁹³

UHI never had an office, warehouse, retail outlet, or any other type of business location in Indiana, never owned any tangible property in Indiana, never had any employees located in Indiana, and never performed any services in Indiana. At all times, UHI conducted its business activities entirely at its headquarters in Phoenix, Arizona.⁴⁹⁴

482. 831 N.E.2d 1274 (Ind. Tax Ct. 2005).

483. *Id.* at 1274.

484. *Id.*

485. *Id.* at 1274-75.

486. *Id.* at 1275.

487. *Id.* at 1276-77.

488. *Id.* at 1276.

489. 826 N.E.2d 713 (Ind. Tax Ct.), *review denied*, 841 N.E.2d 181 (Ind. 2005).

490. *Id.* at 714.

491. *Id.*

492. *Id.*

493. *Id.* at 715.

494. *Id.*

The IDSR tried to assess the rental companies, but when the Tax Court held that the rental companies were not liable for 100% of the receipts,⁴⁹⁵ the IDSR then assessed UHI for the tax on the receipts.⁴⁹⁶ The IDSR and UHI stipulated to these facts and filed cross motions for summary judgment.⁴⁹⁷

The Tax Court found that as a non-resident UHI was only liable for tax on income derived from sources within Indiana.⁴⁹⁸ The Tax Court found that the critical transactions in this case all took place outside of Indiana because all of UHI's services were completely rendered wholly outside the State.⁴⁹⁹ The IDSR claimed that they were not trying to tax the service fees received but rather were assessing tax on the portion of the rental receipts received by UHI from the rental companies within Indiana.⁵⁰⁰ The IDSR argued that in *U-Haul I*⁵⁰¹ the Tax Court held that the rental companies were agents of the UHI and also that each member of the U-Haul System had a beneficial interest in a percentage of the rental receipts.⁵⁰² The Tax Court held that although UHI did have a beneficial interest in the rental receipts, UHI did not have a contractual interest specifically in the rental receipts, and therefore could not be considered to have income derived from sources within Indiana.⁵⁰³ The Tax Court therefore granted UHI's motion for summary judgment.⁵⁰⁴

3. *David R. Webb Co. v. Indiana Department of State Revenue*.⁵⁰⁵—David R. Webb Company ("Webb") appealed the IDSR's assessment of Indiana's gross income tax on sales to out-of-state purchasers that the IDSR considered local transactions subject to the tax.⁵⁰⁶ Webb is a Nevada Corporation with its principal place of business in Edinburgh, Indiana. Webb sold wood veneer which it manufactured to foreign (outside the United States) customers. These customers would send representatives to examine the veneer in Indiana, and would sign sales agreements with Webb.⁵⁰⁷ The agreement would contain terms for either "C&F/CIF" or "FOB New York/FOB Miami." Webb, pursuant to the CIF sales agreements, would transport the veneer to a U.S. port from Edinburgh via common carrier, load it on a ship, pay the freight to the port, insure the veneer

495. *U-Haul Co. of Ind., Inc. v. Ind. Dep't of State Revenue (U-Haul I)*, 784 N.E.2d 1078 (Ind. Tax Ct. 2002).

496. *U-Haul Int'l*, 826 N.E.2d at 715.

497. *Id.*

498. *Id.* at 717.

499. *Id.*

500. *Id.*

501. *U-Haul Co. of Ind., Inc. v. Ind. Dep't of State Revenue (U-Haul I)*, 784 N.E.2d 1078 (Ind. Tax Ct. 2002).

502. *U-Haul Int'l*, 826 N.E.2d at 717.

503. *Id.* at 718.

504. *Id.*

505. 826 N.E.2d 166 (Ind. Tax Ct. 2005).

506. *Id.* at 166-67.

507. *Id.*

for transport, and obtain a bill of lading from the ship owner. Webb, for the FOB agreements, would only quote the price of the veneer, and then at Webb's own expense and risk would be required to transport the veneer from Edinburgh to either New York or Miami.⁵⁰⁸ The foreign customers would then take delivery at either the New York or Miami Port.

The Tax Court, in analyzing Webb and the IDSR's cross motions for summary judgment, stated that "so long as 'a local transaction is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce[,] a state tax will not run afoul of the Commerce Clause [of the U.S. Constitution].'"⁵⁰⁹ The IDSR claimed that these sales were completed in Indiana, and therefore, under its regulations interpreting the exemption, were subject to gross income tax.⁵¹⁰ The IDSR specifically claimed that when the foreign customers came to Indiana to inspect the veneer, they accepted it when they signed the sales agreement.⁵¹¹ Webb claimed that the precedent on this issue was clear and the sale was not complete until actual physical delivery was taken by the buyer.⁵¹² The IDSR claimed that although precedent was clear that actual physical delivery was an event adequate enough to allow local taxation, it was not the only event which allowed the transaction to become local, and acceptance and inspection can also make the transaction taxable.⁵¹³ The Tax Court disagreed and, in granting Webb's motion for summary judgment, held that the IDSR's interpretation of delivery, acceptance, and inspection would be well outside the traditional view of these concepts as shown specifically in the Indiana Uniform Commercial Code.⁵¹⁴ The Tax Court pointed out that acceptance and inspection, as defined in Indiana Code section 26-1-2-513, do not occur until after delivery has taken place.⁵¹⁵ The Tax Court also held that the foreign customers were examining and contracting for the veneer rather than inspecting and accepting the goods while at the Edinburgh location.⁵¹⁶

4. *Kohl's Department Stores, Inc. v. Indiana Department of State Revenue*.⁵¹⁷—Kohl's Department Stores ("Kohl's") appealed the IDSR's denial of Kohl's claims for refund for income tax paid in 1997, 1998 and 1999.⁵¹⁸ Kohl's originally filed combined returns, but later filed amended returns

508. *Id.*

509. *Id.* at 168-69 (quoting *Int'l Harvester Co. v. Dep't of Treasury*, 322 U.S. 340, 346 (1944) (alteration in original)).

510. *Id.* at 169 (referring to 45 IND. ADMIN. CODE 1-1-119 (2005)).

511. *Id.*

512. *Id.* (citing *Int'l Harvester*, 322 U.S. at 340).

513. *Id.* at 170.

514. *Id.* at 171.

515. *Id.* at 171-72.

516. *Id.* at 172.

517. 822 N.E.2d 297 (Ind. Tax Ct. 2005).

518. *Id.* at 298.

separately and made a claim for refund which was denied by the IDSR.⁵¹⁹ Kohl's and the IDSR filed cross motions for summary judgment and the sole issue for the Tax Court to decide was whether Kohl's needed permission from the IDSR to discontinue filing combined Indiana income tax returns.⁵²⁰ The Tax Court granted Kohl's motion for summary judgment finding that, although the statute for filing a combined return does require the taxpayer to petition for permission from the IDSR to do so, there is no corresponding requirement of permission to discontinue filing combined returns.⁵²¹

The Tax Court did not agree with the IDSR's claim that under this interpretation a taxpayer could reach back as far as it wished to seek refunds on this basis.⁵²² The Tax Court found that the statute of limitation for refunds only allowed a taxpayer to reach back three years.⁵²³ The Tax Court further found that to read into the statute this requirement of permission to discontinue filing combined returns would require the Tax Court to assume that the legislature simply neglected to address a requirement that even the IDSR labels "critical."⁵²⁴ Therefore, the Tax Court granted Kohl's motion for summary judgment.⁵²⁵

D. Controlled Substances Excise Tax

1. *Newby v. Indiana Department of State Revenue*.⁵²⁶—Gary M. Newby ("Newby") appealed the IDSR's assessment of controlled substance excise tax ("CSET").⁵²⁷ Newby's motion for summary judgment claimed that double jeopardy precluded the assessment and that the assessment of CSET violated the plea agreement Newby had with the State.⁵²⁸ In 1997, Newby was arrested and charged with possession of controlled substances at his residence and also charged with maintaining a common nuisance.⁵²⁹ The Indiana Court of Appeals found the search warrant invalid and therefore the controlled substances inadmissible.⁵³⁰ Newby then entered into a plea with the State to plead guilty to the common nuisance and hand over all the controlled substances seized, and the State agreed to drop all other charges and seek no further fines or forfeitures.⁵³¹ After the plea was accepted in 1999, the IDSR assessed CSET, penalties, and

519. *Id.* at 299.

520. *Id.* at 298.

521. *Id.* at 299-300 (citing IND. CODE § 6-3-2-2(g) (2005)).

522. *Id.* at 300-01.

523. *Id.* at 301.

524. *Id.* at 301-02.

525. *Id.* at 302.

526. 826 N.E.2d 173 (Ind. Tax Ct. 2005).

527. *Id.* at 174.

528. *Id.*

529. *Id.*

530. *Id.* (citing *Newby v. State*, 701 N.E.2d 593, 604 (Ind. Ct. App. 1998)).

531. *Id.* at 174-75.

fees in the amount of \$871,437.50 against Newby.⁵³²

Newby claimed that because possession of a controlled substance and common nuisance were the same offense, the assessment, which was punishment for possession, constituted double jeopardy.⁵³³ The Tax Court held that federal double jeopardy did not apply because a person may commit a common nuisance without having possessed the controlled substance, and it is possession alone which allows assessment of the CSET.⁵³⁴ The Tax Court then held that the actual evidence test for the Indiana double jeopardy analysis could not be applied because the guilty plea was entered before any evidence was presented.⁵³⁵ Furthermore, the Tax Court found that since possession and common nuisance were not the same offense, the assessment of CSET was Newby's only jeopardy for the possession of a controlled substance.⁵³⁶ The Tax Court then held that the assessment of CSET did not violate the plea agreement because the legislature clearly stated in the statute that CSET was in addition to any criminal penalties and forfeitures, and furthermore the Tax Court noted that the prosecutor can not bind the rights of the IDSR to assess the tax.⁵³⁷ For these reasons the Tax Court denied Newby summary judgment and granted the IDSR's summary judgment motion.⁵³⁸

2. *Barney v. Indiana Department of State Revenue*.⁵³⁹—Chadd Barney ("Barney") appealed the IDSR's assessment of controlled substances excise tax ("CSET") against him.⁵⁴⁰ Barney claimed that the exclusionary rule barred the use of Barney's admissions in a tax assessment proceeding, that the admissions were not sufficient evidence that Barney possessed the marijuana to which CSET was assessed, and that the IDSR did not properly allow for the weight of the marijuana in their assessment.⁵⁴¹ Barney was arrested for receiving a package of marijuana at a Grant County address, and during the post arrest interview he admitted to receiving twelve other packages at various addresses in Indiana.⁵⁴² The IDSR assessed CSET on Barney of more than \$650,000.⁵⁴³ The IDSR assessed the CSET based on the weight of the parcels Barney identified on the watch list and not from the actual weight of the marijuana because the parcels were not recovered.⁵⁴⁴ The IDSR sustained Barney's protest on six of the twelve parcels because of lack of evidence to show actual possession, and originally

532. *Id.* at 175.

533. *Id.*

534. *Id.* at 176.

535. *Id.* at 176-77.

536. *Id.* at 177.

537. *Id.* at 177 & n.4.

538. *Id.*

539. 823 N.E.2d 339 (Ind. Tax Ct. 2005).

540. *Id.* at 340.

541. *Id.*

542. *Id.*

543. *Id.*

544. *Id.* at 340 & n.1.

denied the protests with respect to the other six parcels. The IDSR later agreed to base its assessment on a reduced amount of three packages, again due to lack of sufficient evidence that the other three packages contained marijuana.⁵⁴⁵

Barney's exclusionary claim is based on his assertion that the evidence of the parcels was secured through duress and coercion and therefore a violation under *Miranda v. Arizona*.⁵⁴⁶ The Tax Court held that it did not need to determine if a violation of *Miranda* occurred because the exclusionary rule does not apply to tax proceedings because the purpose of the rule, deterring police misconduct, is not served by applying it in a CSET case.⁵⁴⁷ The Tax Court next sided with the IDSR in holding that once a proposed assessment of the CSET is made, the burden is on Barney to make a prima facie case. The Tax Court pointed out that "a taxpayer who claims he is not within the ambit of taxation bears the burden of proof."⁵⁴⁸ The Tax Court found that Barney's only claim was that the evidence was secured under duress and coercion, and therefore he did not make his prima facie showing that the parcels assessed did not contain marijuana, and consequently the assessments were upheld.⁵⁴⁹

Barney then presented the IDSR's Letter of Finding ("LOF") on the assessment issued on September 29, 2000, and claimed the weights of the parcels listed individually in the LOF did not subtract the weight of the packaging from the weight on which the CSET was assessed.⁵⁵⁰ The Tax Court found that the individual weights of the packages did not appear in the LOF but only on the parcel watch list, and the agent who prepared the assessment testified that he subtracted 1300 grams per package to account for the weight of the packaging materials.⁵⁵¹ Therefore the Tax Court held that without further evidence to support Barney's claim, the weights used in the IDSR's assessment were affirmed.⁵⁵²

E. Inheritance Tax

1. *In re Estate of Wilson*.⁵⁵³—Alice W. Thomas ("Thomas") appealed the Orange County Circuit Court's ("probate court") March 2004 redetermination of Indiana inheritance tax liability of her mother's Estate.⁵⁵⁴ In 2001, Pearl Wilson ("Wilson") conveyed 397 acres, previously appraised at \$637,000, to Thomas.

545. *Id.* at 340 n.2.

546. *Id.* at 341 (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

547. *Id.*

548. *Id.* at 341-42 (internal quotation marks omitted) (quoting *Longmire v. Ind. Dep't of State Revenue*, 638 N.E.2d 894, 898 (Ind. Tax Ct. 1994)).

549. *Id.* at 342.

550. *Id.*

551. *Id.*

552. *Id.*

553. 822 N.E.2d 292 (Ind. Tax Ct. 2005).

554. *Id.* at 293.

Wilson died twenty days later.⁵⁵⁵ In March 2002, Thomas filed an inheritance tax return reporting no taxes due. The county appraiser reviewed the return⁵⁵⁶ and forwarded it to the probate court, which entered an order that no inheritance tax was due.⁵⁵⁷ In 2002, the IDSR “filed both a motion to set aside the probate court’s order, pursuant to Indiana Trial Rule 60(B), and a ‘Petition for Rehearing, Reappraisal and Redetermination of Inheritance and Transfer Tax’” to set aside the probate court’s order after alleging that the valuation of the land should have been included in the taxable Estate in the amount of \$637,000.⁵⁵⁸ The IDSR claimed that more than \$22,000 in inheritance tax was owed on the Estate. In 2003, following a hearing, the probate court determined that the estate owed inheritance taxes totaling \$22,692.28, plus interest.⁵⁵⁹

Thomas claimed that the IDSR’s Petition was untimely filed and the probate court lacked subject matter jurisdiction.⁵⁶⁰ The IDSR claimed the Petition was filed on time, and if determined untimely, claimed that the circumstances in this case excused it from timely filing the Petition.⁵⁶¹ Indiana Code section 6-4.1-7-1 provides that a person who is not satisfied with an inheritance tax determination must file a petition for rehearing within 120 days after the determination.⁵⁶² Thomas claimed the plain language of the statute was clear.⁵⁶³ The IDSR argued that the 120-day period did not begin until they received actual notice of the determination.⁵⁶⁴ The Tax Court held that the Petition was not timely filed, stating that “[w]hen the language of a statute is plain and unambiguous, the court has no power to construe the statute for the purpose of limiting or extending its operation.”⁵⁶⁵

Thomas claimed that if the Petition was not filed timely then the probate court lacked jurisdiction.⁵⁶⁶ The IDSR claimed that once it became aware of the probate court’s order, it filed a timely Indiana Trial Rule 60(B) motion which allows a party to have a judgment set aside for “reasons of mistake, surprise, or excusable neglect.”⁵⁶⁷ The Tax Court found that the probate court in its discretion could determine the presence of mistake, surprise, or excusable neglect, and therefore the Tax Court would only overturn the probate court’s

555. *Id.*

556. Pursuant to IND. CODE § 6-4.1-5-2 (2005).

557. *Thomas*, 822 N.E.2d at 293-94.

558. *Id.* at 294.

559. *Id.*

560. *Id.*

561. *Id.* at 294-95.

562. *Id.* at 295 (citing IND. CODE § 6-4.1-7-1 (2005)).

563. *Id.*

564. *Id.*

565. *Id.* (internal quotation marks omitted) (quoting *F.A. Wilhelm Constr. Co. v. Ind. Dep’t of State Revenue*, 586 N.E.2d 953, 955 (Ind. Tax Ct. 1992)).

566. *Id.* at 295.

567. *Id.* at 296 (quoting IND. TRIAL R. 60(B)(1)).

decision if there was found to be abuse of discretion.⁵⁶⁸ The Tax Court held that the probate court did not err in its redetermination of the Estate's inheritance tax liability since the IDSR could show surprise as well as the required showing that the case would have come out differently if tried on its merits.⁵⁶⁹ The Tax Court held that the probate court is not the supervisor, enforcer, or collector of inheritance tax, but the IDSR is, and since the IDSR did not have actual notice that the Estate was being processed prior to the lapse of the 120-day period and could not therefore timely challenge the determination, the element of surprise applied in this case.⁵⁷⁰

568. *Id.*

569. *Id.* at 296-97.

570. *Id.*

RECENT DEVELOPMENTS IN INDIANA TORT LAW

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This Article discusses significant developments in tort law in Indiana during the survey period. In light of the breadth of the subject area, this Article is neither comprehensive nor exhaustive. This Article does not attempt to address in detail all of the cases applying tort law in Indiana during the survey period, but attempts to address selected cases in which the courts have interpreted the law or clarified existing law.

I. NEGLIGENCE

There were a number of significant developments in the area of negligence law during the survey period. Among other things, the courts held that, where duties of care have already been defined by Indiana law, it is unnecessary to perform an analysis of the reasonableness of a party's conduct under *Webb v. Jarvis*¹ or to consider what a similarly situated person might do under the circumstances.

A. Duty of Care

1. *Seventeen-year-old Child Must Exercise Reasonable and Ordinary Care of an Adult.*—In *Penn Harris Madison School Corp. v. Howard*,² a seventeen-year-old high school student fell from a zip-line he had constructed for a school production and brought suit against the school for the significant injuries he suffered. A jury awarded the student \$200,000 in damages. On appeal, the school challenged the jury instruction which instructed that the student “was bound to exercise in regard to his own contributory negligence . . . *reasonable care [that] a person of like age, intelligence, and experience would ordinarily exercise under like or similar circumstances.*”³ The student argued that a different standard of care applies to contributory negligence than to comparative fault. The court of appeals reversed and remanded for a new trial, explaining that this instruction misstated the standard under Indiana law:

Indeed, Indiana Pattern Jury Instruction No. 5.25 states in relevant part that “[a] child over the age of fourteen (14) [absent special circumstances] must exercise the reasonable and ordinary care of an adult.” In this case, [the student] was seventeen years old at the time he was injured Thus, he was charged with exercising the standard of

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1. 575 N.E.2d 992 (Ind. 1991).

2. 832 N.E.2d 1013 (Ind. Ct. App.), *trans. granted*, 841 N.E.2d 188 (Ind. 2005).

3. *Id.* at 1016 (emphasis added).

care of an adult absent special circumstances.⁴

However, the Indiana Supreme Court granted transfer on November 1, 2005, but has not yet decided the case. Its decision could clarify or modify the law regarding the standard of care applicable to children.

2. *Duty of One Contractor to Another Contractor's Employees.*—In *Horine v. Homes by Dave Thompson, LLC*,⁵ an employee of one subcontractor on a residential construction project was injured when he fell from a roof after stepping on loose roofing materials installed by another subcontractor on the project. He filed suit against both subcontractors for his injuries.⁶ The trial court granted the roofer's summary judgment motion on the question of the employee's negligence.⁷ On appeal, the employee argued that the roofer had a duty to "reasonably foreseeable persons who would be working on the roof" to assure that the roofing materials were installed properly.⁸ The Indiana Court of Appeals agreed, quoting *Guy's Concrete, Inc. v. Crawford*:⁹

[I]n general, a contractor has a duty to use ordinary care both in its work and in the course of performance of the work. Where an independent contractor is in control of the construction or premises and the independent contractor's negligence results in injury to another person on the premises, the independent contractor may be held liable under Indiana law.¹⁰

In a footnote, the court explained that "it is unnecessary for us to perform the *Webb* analysis because our supreme court and this court have already held that contractors performing work owe a duty to third persons rightfully on the construction premises."¹¹

3. *Governmental Duty and Increased Risk Due to Failure to Warn.*—In *City of Muncie ex rel. Muncie Fire Department v. Weidner*,¹² parents filed suit for the failure of the fire department to protect their child from a downed, live power line which caused the child's electrocution in an adjacent backyard one day after the fire department had responded to a complaint and reported the downed wire to the electric company.¹³ The City of Muncie sought summary judgment on a number of grounds and, on appeal, argued it was entitled to summary judgment

4. *Id.*

5. 834 N.E.2d 680 (Ind. Ct. App. 2005).

6. *Id.* at 682.

7. *Id.*

8. *Id.* at 684.

9. 793 N.E.2d 288 (Ind. Ct. App. 2003).

10. *Horine*, 834 N.E.2d at 684 (internal citation omitted) (quoting *Guy's Concrete*, 793 N.E.2d at 295).

11. *Id.* at 684 n.3 (quoting *Guy's Concrete*, 793 N.E.2d at 294 n.4 (citing *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991))).

12. 831 N.E.2d 206 (Ind. Ct. App.), *reh'g denied* (2005), and *trans. denied* (Ind. 2006).

13. *Id.* at 209.

because (1) it owed no duty to protect the child from power lines controlled by the electric company; and (2) it was entitled to immunity either under the common law or under the Emergency Management and Disaster Law.¹⁴

After reciting the burden on a claim of negligence, the court noted “[a] governmental unit is bound by the same duty of care as a non-governmental unit except where the duty alleged to have been breached is so closely akin to one of the limited exceptions (prevent crime, appoint competent officials, or make correct judicial decisions).”¹⁵ The plaintiffs conceded that the fire department owed only the duty it assumed by responding to the neighbor’s call; therefore, the court noted that the fire department’s liability would hinge on the duty it assumed.¹⁶ Although noting that section 324A of the Restatement (Second) of Torts¹⁷ “parallels Indiana’s doctrine of assumed duty”¹⁸ and that the questions whether and to what extent a party owes a duty are for the factfinder, the court explained it may decide the issue as a matter of law if the record contains insufficient evidence to establish a duty.¹⁹ Rejecting the plaintiffs’ argument that there was an increased risk because the fire department did not warn the child, the court explained that the standard “is not whether the risk of harm would have *decreased* had the fire department acted with reasonable care. Rather, it is whether the fire department’s failure to exercise reasonable care *increased* the risk of such harm.”²⁰ Finding no evidence in the record that the child actually relied on the fire department’s actions, the court found, as a matter of law, that there was insufficient evidence to establish a duty.²¹ In a footnote, the court clarified that it did not intend to suggest that it was necessary to have evidence that the fire department spoke directly to the child before a duty could be found, only that the lack of evidence of any reliance precluded a finding of assumed

14. *Id.* at 211 (citing IND. CODE § 10-14-3 (2005)).

15. *Id.* at 212.

16. *Id.*

17. The RESTATEMENT (SECOND) TORTS § 324A (1965) provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

See *Weidner*, 831 N.E.2d at 212.

18. *Weidner*, 831 N.E.2d at 212.

19. *Id.* (citing *Bldg. Materials Mfg. Corp. v. T & B Structural Sys., Inc.*, 804 N.E.2d 277, 282 (Ind. Ct. App. 2004)).

20. *Id.* at 213.

21. *Id.*

duty.²²

4. *Statutory Duty Owed by Roller Skating Rink Operators.*—The court construed the statutory duty of roller skating rink operators under a section of the Indiana Code in *St. Margaret Mercy Healthcare Centers, Inc. v. Poland*,²³ in which a skater was injured when she fell while skating. The skater alleged that the rink was negligent in permitting skaters to be “out of control [with] nobody seem[ing] to be supervising them.”²⁴ The jury found in favor of the skater and, on appeal, the rink asserted error in the trial court’s use of Pattern Jury Instruction No. 5.41²⁵ on incurred risk, which it contended was a misstatement of the law since Indiana Code section 34-31-6-3²⁶ presumes an assumption of the risk in the skating context.²⁷

Construing the statute, the court noted that “[d]ue to the nature of roller skating, the Indiana Legislature imposed specific duties and responsibilities upon roller skating rink operators . . . [and] also imposed certain duties upon roller skaters.”²⁸ Moreover, the legislature said that, “if a roller skating rink operator is in compliance with the specified duties and responsibilities outlined in Section 1, then pursuant to Indiana Code § 34-31-6-4²⁹ . . . the operator is entitled to a

22. *Id.* at 213 n.5.

23. 828 N.E.2d 396 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 184 (Ind. 2005).

24. *Id.* at 399.

25. The jury was instructed that the “[p]laintiff incurs the risk of injury if she actually knew of a specific danger, understood the risk involved, and voluntarily exposed herself to that danger.” *Id.* at 402.

26. The statute provides:

(a) Roller skaters are considered to:

1. have knowledge of; and
2. assume; the risks of roller skating.

(b) For purposes of this chapter, risks of roller skating include the following:

1. Injuries that result from collisions or incidental contact with other roller skaters or other individuals who are properly on the skating surface.
2. Injuries that result from falls caused by loss of balance.
3. Injuries that involve objects or artificial structures that:
 - A. are properly within the intended path of travel of the roller skater; and
 - B. are not otherwise attributable to an operator’s breach of the operator’s duties under section 1 [IC 34-31-6-1] of this chapter.

IND. CODE § 34-31-6-3 (2005).

27. *St. Margaret*, 828 N.E.2d at 400.

28. *Id.* at 402.

29. The statute provides:

- (a) Except as provided in subsection (b) and notwithstanding IC 34-51-2-6 concerning comparative fault, the assumption of risk under section 3 of this chapter is a complete defense to an action against an operator by a roller skater for injuries and property damage resulting from the assumed risks.
- (b) The following applies if an operator has violated any one (1) of the operator’s

complete defense against liability from roller skaters who experience falls due to collisions and incidental contact.”³⁰ The jury heard conflicting evidence, but the court concluded that once the jury reached the verdict that the rink failed to exercise reasonable care in supervising skaters on the floor, it “was compelled to proceed to I.C. § 34-51-2-6 for a comparative fault analysis regarding damages, if any.”³¹ As the evidence was sufficiently probative to support the jury’s finding, the trial court did not abuse its discretion in giving the instruction on incurred risk.³²

After reciting the standards for statutory interpretation and reiterating the legislature’s statements as to the specific duties and responsibilities of skating rink operators, the court concluded that it was well within the province of the jury to determine what percentage fault, if any, should be apportioned among the parties.³³ Although the evidence was conflicting, the rink provided no authority to suggest that the jury was required to apportion *some* fault to the plaintiff under the comparative fault analysis, and the jury’s verdict apportioning zero fault to the plaintiff was supported by the evidence and the law.³⁴

B. Intervening Cause

1. Foreseeability and Intervening Cause.—In *Mayfield v. The Levy Co.*,³⁵ a steel company employee who worked as a switchman on a train brought suit against an independent contractor for injuries suffered when he fell into a trench filled with scalding water. The trench was used to cool slag, a byproduct of steelmaking. The plaintiff, riding on the train, observed a truck trying to beat the train to a crossing. Fearing a collision, the plaintiff stepped off the train, landing on a large piece of slag, which caused him to fall into the trench that the independent contractor controlled and used to cool the slag.³⁶ The plaintiff suffered severe burns.

The trial court granted summary judgment in favor of the independent contractor, finding (1) that the contractor did not have control over the premises and therefore had no legal duty to the employee, (2) the independent contractor did not have superior knowledge with regard to dangers on the premises, and (3)

duties or responsibilities under section 1 [IC 34-31-6-1] of this chapter:

1. The complete defense against an action against an operator under subsection (a) does not apply.
2. The provisions of IC 34-51-2-6 [comparative fault] apply.

IND. CODE § 34-31-6-4 (2005).

30. *St. Margaret*, 828 N.E.2d at 402-03.

31. *Id.* at 405.

32. *Id.*

33. *Id.* at 406-07.

34. *Id.* at 408.

35. 833 N.E.2d 501 (Ind. Ct. App. 2005).

36. *Id.* at 507.

there was no evidence establishing that the injury was foreseeable.³⁷ On appeal, the court focused solely on the question of proximate cause.³⁸ Although it was foreseeable that the independent contractor's "failure to remove the slag from the ground or its failure to drain the water might cause injuries to a person walking near the sump pump area," the court held it was not foreseeable that the failure to "maintain that area would cause injuries to an individual riding a train."³⁹ Therefore, "[i]t was not [the independent contractor's] negligent conduct . . . , but rather, the negligent, reckless, or intentional conduct of the . . . truck driver that caused [the] accident. The truck driver's actions constitute an intervening cause superseding any liability on the part of [the independent contractor]."⁴⁰ As a result, the independent contractor's conduct was not the proximate cause of the injuries.⁴¹

C. Comparative Fault

1. *Additur and the Impact of Comparative Fault on Derivative Claims.*—In *Hockema v. J.S.*,⁴² the court addressed a matter of first impression: whether parents can recover medical expenses on a derivative claim if the underlying claim is barred because the child's fault is greater than fifty percent. A child ran into the road and collided with a car driven by a seventeen-year-old driver.⁴³ The jury found the driver only 33.25% at fault, the child 66.75% at fault, and awarded the child zero damages.⁴⁴ The parents filed a motion to correct error seeking additur or a new trial, "claim[ing] that the jury erred by not awarding [them] damages for a percentage of the stipulated medical expenses."⁴⁵ After a hearing, the trial court entered judgment in favor of the parents for 33.25% of the stipulated amount of medical expenses.⁴⁶

The court of appeals noted that, although the trial court has broad discretion on a motion to correct error, the remedy of additur or remittitur under Trial Rule 59(J)(5)⁴⁷ "is only available when the evidence is insufficient to support the

37. *Id.* at 504.

38. *Id.* 505 n.4 ("Because we conclude that the undisputed material facts establish that [the independent contractor's] alleged negligence was not the proximate cause of [the employee's] injuries, we do not address [the] argument that [it] owed him a duty and breached that duty as a matter of law. . . . If we were to address [that] argument, we would likely conclude that . . . [it] is a question that must be resolved by the trier-of-fact.").

39. *Id.* at 507.

40. *Id.*

41. *Id.*

42. 832 N.E.2d 537 (Ind. Ct. App.), *reh'g denied* (2005), and *trans. denied* (Ind. 2006).

43. *Id.* at 538.

44. *Id.*

45. *Id.* at 540.

46. *Id.*

47. IND. TRIAL R. 59(J)(5) provides:

The court, if it determines that prejudicial or harmful error has been committed, shall

verdict as a matter of law.”⁴⁸ The Indiana Comparative Fault Act, a “modified fifty percent” comparative fault law, states that “if a claimant is deemed to be more than fifty percent at fault, then the claimant is barred from recovery.”⁴⁹ Thus, additur was inappropriate.⁵⁰ The parents’ duty to pay medical expenses is not a direct injury to the parents but one arising out of the parents’ duty to provide medical care for their child.⁵¹

If the child was not a minor, the medical expenses would be his own, and the parents would not be obligated to pay them. The right of the parents to recover the child’s medical expenses, hence, rests upon the child’s right to recover and therefore may be appropriately categorized as a derivative right.⁵²

Thus, although the parent has a cause of action to recover medical expenses, the right is derivative and “may be barred [if] the child’s comparative negligence . . . exceeds the negligence of the tortfeasor.”⁵³

2. *When Comparative Fault Is a Frivolous Defense.*—In *Stoller v. Totton*,⁵⁴ the driver of a semi tractor-trailer that struck an automobile when it moved into the automobile’s lane asserted the affirmative defense of comparative fault.⁵⁵ During the discovery process, the driver of the semi admitted the auto was in the lane when he entered it with his semi, but denied requests for admission saying that he was negligent in his operation of the semi.⁵⁶ Further, in response to interrogatories, the semi driver asserted that he did not see anyone in the lane when he moved into it⁵⁷ and, in his deposition, the semi driver testified that he did not know of anything the auto driver had done to cause the accident.⁵⁸ Despite repeated requests to withdraw the defense and the plaintiff’s warning that she would seek sanctions if he failed to do so, the case was tried to a jury.

take such action as will cure the error, including without limitation the following with respect to all or some of the parties and all or some of the errors:

...

(5) In the case of excessive or inadequate damages, enter final judgment on the evidence for the amount of the proper damages, grant a new trial, or grant a new trial subject to additur or remittitur[.]

See *Hockema*, 832 N.E.2d at 541.

48. *Hockema*, 832 N.E.2d at 541 (citing *Childress v. Buckler*, 779 N.E.2d 546, 550 (Ind. Ct. App. 2002)).

49. *Id.* at 542 (citing IND. CODE §§ 34-51-2-6, 34-51-2-7, 34-51-2-14 (2005)).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 543.

54. 833 N.E.2d 53 (Ind. Ct. App.), *trans. denied* (Ind. 2005).

55. *Id.* at 54.

56. *Id.*

57. *Id.* at 55.

58. *Id.*

After three witnesses had testified, the semi driver admitted that he was liable and withdrew his defense.⁵⁹ After entering judgment on the jury verdict, the trial court granted the auto driver's motion for costs and attorney's fees, finding that the semi driver's defense was frivolous and in bad faith.⁶⁰ The semi driver appealed.

Quoting *Grubnich v. Renner*,⁶¹ the court explained:

A defense is "frivolous" (a) if it is made primarily to harass or maliciously injure another, (b) if counsel is unable to make a good faith and rational argument on the merits of the action, or (c) if counsel is unable to support the action by a good faith and rational argument for extension, modification, or reversal of existing law. A defense is "unreasonable" if, based upon the totality of the circumstances, including the law and facts known at the time, no reasonable attorney would consider the defense justified or worthy of litigation. A defense is "groundless" if no facts exist which support the defense relied upon and supported by the losing party.⁶²

The court noted specifically the many occasions when the driver had the opportunity to review the facts, the admission of facts that were contrary to his comparative fault defense theory, and his "repeated[] refus[al] to settle the issue of liability while continuing to advance a theory that he had no evidence to support."⁶³ Stressing that the holding should be limited to the facts and expressing concerns that the holding may have detrimental effects on settlement negotiations if expanded, the court clarified:

Where it is clear that liability lies with one party, we encourage settlement of that issue without fear of the imposition of sanctions. It is only in the clearest of cases where an affirmative defense is frivolous, unreasonable, or groundless, yet is maintained until liability is admitted during the trial that costs and attorney's fees will be appropriate sanctions.⁶⁴

Although the court focused on the impact of its holding on settlement, the language of its holding may actually serve the opposite purpose. As written, the court suggests it is the admission of liability during trial that is the trigger for the bad faith finding rather than the absence of evidence in support of the defense. Framed this way, the holding discourages the admission of liability and may cause a defendant to choose silence on the issue, forcing a jury verdict, in order to avoid the risk of a bad faith finding even when the evidence clearly would support only one outcome.

59. *Id.*

60. *Id.*

61. 746 N.E.2d 111 (Ind. Ct. App. 2001).

62. *Stoller*, 833 N.E.2d at 55 (quoting *Grubnich*, 746 N.E.2d at 119).

63. *Id.* at 56.

64. *Id.*

3. *Is Mitigation of Damages Evidence of Comparative Fault?*—In *Kocher v. Getz*,⁶⁵ the Indiana Supreme Court revisited an issue previously decided in *Deible v. Poole*,⁶⁶ which was expressly adopted by the supreme court,⁶⁷ but the holding of which the court of appeals refused to follow in *Kocher*.⁶⁸ At the jury trial in *Kocher*, the defendant claimed that “the plaintiff failed to mitigate her damages [because] she made insufficient efforts to find replacement part-time employment . . . after the accident.”⁶⁹

The court explained that the Comparative Fault Act (the “Act”) provides, in part, that the term fault “also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and *unreasonable failure to avoid an injury or to mitigate damages*.”⁷⁰ Explaining *Deible*, which addressed this portion of the Act, the court noted that “the obligation of a plaintiff to mitigate damages customarily refers to the expectation that a person injured should act to minimize damages after an injury-producing incident.”⁷¹ This is different from the allocation of fault under the Act, as the “[f]ailure to minimize damages does not bar the remedy, but goes only to the amount of damages recoverable.”⁷² Thus, the trial court’s refusal of the defendant’s proffered jury instruction was consistent with the court’s adoption of *Deible* and should have been affirmed by the court of appeals. Agreeing with Judge Vaidik’s dissent in *Kocher*, the court explained:

In cases arising under the Act, a defense of mitigation of damages based on a plaintiff’s acts or omissions occurring *after* an accident or initial injury is not properly included in the determination and allocation of “fault” under the Act. The phrase “unreasonable failure to avoid an injury or to mitigate damages” included in the definition of “fault” under Indiana Code § 34-6-2-45(b) applies only to a plaintiff’s conduct *before* an accident or initial injury. An example of such unreasonable failure to avoid an injury or to mitigate damages would be a claimant’s conduct in failing to exercise reasonable care in using appropriate safety devices, e.g., wearing safety goggles while operating machinery that presents a substantial risk of eye damage.⁷³

The practitioner may want to review the case for style. In footnote three, the court explained that it wrote the opinion as an experiment, following the style

65. 824 N.E.2d 671 (Ind. 2005).

66. *Deible v. Poole*, 691 N.E.2d 1313 (Ind. Ct. App.), *aff’d*, 702 N.E.2d 1076 (Ind. 1998).

67. 702 N.E.2d 1076 (Ind. 1998).

68. *Kocher*, 824 N.E.2d at 674.

69. *Id.* at 673.

70. *Id.* (quoting IND. CODE § 34-6-2-45(b) (2005) (emphasis added by the court)).

71. *Id.* at 674.

72. *Id.* (quoting *Deible v. Poole*, 691 N.E.2d 1313, 1316 (Ind. Ct. App.), *aff’d*, 702 N.E.2d 1076 (Ind. 1998)).

73. *Id.* at 674-75 (internal citations omitted).

recommendations of Bryan Garner in *The Winning Brief*.⁷⁴ Noting that the style did not meet with universal approval,⁷⁵ the court asked for comments from the public, the bench and the bar.

4. *Supervising Parent as Nonparty*.—In *Witte v. Mundy ex rel. Mundy*,⁷⁶ the Indiana Supreme Court addressed a question of law for which there was no prior clear precedent. In *Witte*, a five-year-old child was struck by a car driven by a minor, and the child's mother filed suit, both as her child's next friend and on her own behalf.⁷⁷ Among other things, the driver asserted the mother's negligent supervision as an affirmative defense. Just two days before trial, the mother was permitted to dismiss without prejudice her individual claim. The child sought to preclude evidence of her mother's negligent supervision. In response, the driver, who had resisted the dismissal, sought leave to amend her answer to name the mother as a nonparty. The trial court granted the child's motion in limine regarding her mother's negligent supervision and denied the driver's motion to add the mother as a non-party.⁷⁸

At trial, over the child's objection, the trial court permitted the defendant to question the mother about her supervision of the child and to question the child about her bicycle safety training. The jury returned a defense verdict, and the child filed a motion to correct error, alleging that permitting the driver to solicit information regarding negligent supervision violated the court's prior order. The trial court granted the motion to correct error, and the driver appealed.⁷⁹ The court of appeals affirmed the grant of a new trial on grounds that the trial court should have allowed the defendant to name the mother as a nonparty.

On transfer, the supreme court agreed with the court of appeals that the mother was a proper non-party.⁸⁰ Although a child under seven is considered to be of such tender years that she is incapable of judgment or discretion and therefore not capable of negligence, "[i]t is another thing to conclude that an adult's negligent supervision cannot be a contributing cause to the child's injury relieving a third party of some or all liability."⁸¹

[U]ntil 1995, a "non-party" was defined as "a person who is, or may be liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by the claimant." Under that definition, it would not have been proper to [name the mother] a nonparty because, as [the child's] mother, she would not be liable [for her child's] injuries. However, the definition of nonparty was amended in 1995 to define a nonparty as "a person who caused or

74. *Id.* at 673 n.3 (citing BRYAN GARNER, *THE WINNING BRIEF* 139-47 (2d ed. 2004)).

75. *Id.* (citing Richard A. Posner, *Against Footnotes*, 38 COURT REV. 24 (Summer 2001)).

76. 820 N.E.2d 128 (Ind. 2005).

77. *Id.* at 131.

78. *Id.*

79. *Id.*

80. *Id.* at 133.

81. *Id.*

contributed to cause the alleged injury, death, or damage to property but who has not been joined in the action as a defendant.” This provision was presumably [changed] to permit employers of injured workers to be named as nonparties even though under workers compensation law they have no tort liability to a worker injured by accident on the job.⁸²

As the court observed, the whole purpose of the comparative fault statute is to make a tortfeasor liable to an injured person in proportion to the tortfeasor’s fault.⁸³ Thus, even though the mother would have been immune from suit by her child, the defendant should have been allowed to name her as a nonparty so that the jury could have determined whether any fault on the part of the mother contributed to causing the accident.⁸⁴ Although it was error to refuse to add the mother as a nonparty and to instruct the jury on comparative fault, the error was not grounds for a new trial because it was invited by the child.⁸⁵ Under the doctrine of invited error, which is grounded in estoppel, “a party may not take advantage of an error that she commits, invites, or which is the natural consequence of her own neglect or misconduct.”⁸⁶ Finally, while the grant of a new trial is reversed only for an abuse of discretion, “an error of law is an abuse of discretion.”⁸⁷ Here, the trial court erred on a point of law, even though there was no clear precedent, and as a result, it abused its discretion.⁸⁸

5. *Immunity Under the Guest Statute.*—In *KLLM, Inc. v. Legg*,⁸⁹ the Indiana Court of Appeals considered two significant issues under the Indiana Guest Statute for which there was no direct Indiana precedent: first, when a rider’s status is determined for purposes of the guest statute, and, second, the definition of “in or upon” under the statute.⁹⁰ The Indiana Guest Statute is in derogation of

82. *Id.* (internal citations omitted) (quoting IND. CODE §§ 34-4-33-2(a) (1995); 34-6-2-88 (2004)).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 134 (internal quotation marks omitted) (citation omitted).

87. *Id.* (internal quotation marks omitted).

88. *Id.*

89. 826 N.E.2d 136 (Ind. Ct. App.), *trans. denied* (Ind. 2005).

90. *Id.* at 141-44. The court cites Indiana Code section 34-30-11-1, the Indiana Guest Statute, which provides:

The owner, operator, or person responsible for the operation of a motor vehicle is not liable for loss or damage arising from injuries to or the death of:

- (1) the person’s parent;
- (2) the person’s spouse;
- (3) the person’s child or stepchild;
- (4) the person’s brother;
- (5) the person’s sister; or
- (6) a hitchhiker;

resulting from the operation of the motor vehicle while the parent, spouse, child or

the common law and must be strictly construed, which the court explained “involves a close, conservative adherence to the literal or textual interpretation.”⁹¹ After discussing the history of the Indiana Guest Statute, the court of appeals rejected the personal representative’s argument that the hitchhiker, picked up by a truck driver in Tennessee, ceased being a hitchhiker in Louisville, Kentucky, when the driver offered to let him continue to ride with him to Indiana after the hitchhiker was unable to connect with his girlfriend in Louisville. The statute provides that a hitchhiker is “a passenger who has solicited a ride in violation of [Indiana Code section 9-21-17-16],”⁹² which prohibits a person from standing in the road “for the purpose of soliciting a ride . . . unless the person . . . is faced with an emergency on the roadway.”⁹³ Finding no Indiana law on the subject, the court considered cases from the Missouri Supreme Court⁹⁴ and the Washington Supreme Court⁹⁵ and concluded that the decedent was a hitchhiker at the beginning of the journey and, “[b]ecause there was no interruption in their journey,” his status did not change.⁹⁶

As to the second question, whether the hitchhiker was “in or upon” the vehicle at the time of his injuries,⁹⁷ the court again found no controlling Indiana law. Analogizing from an insurance case construing the term, however, the court agreed with the interpretation given to “upon” in that case and concluded that a person “is not required to be physically inside the vehicle at the time” of the accident, but may be “‘upon’ a motor vehicle if a sufficient relationship exists between that person and the vehicle” at the time of the accident.⁹⁸ In this case, the hitchhiker left the vehicle only temporarily to assist the driver in backing the vehicle into a parking space. The undisputed evidence indicated that both intended he would re-enter the vehicle and continue the journey. In contrast, the actions of the child in *C.M.L. ex rel. Brabant v. Republic Services*,⁹⁹ were not in

stepchild, brother, sister, or hitchhiker was being transported without payment in or upon the motor vehicle unless the injuries or death are caused by the wanton or willful misconduct of the operator, owner, or person responsible for the operation of the motor vehicle.

IND. CODE § 34-30-11-1 (2005).

91. *KLLM*, 826 N.E.2d at 140 (citing *C.M.L. ex rel. Brabant v. Republic Servs., Inc.*, 800 N.E.2d 200, 208-09 (Ind. Ct. App. 2003)).

92. *Id.* at 141 (quoting IND. CODE § 34-6-2-57 (2005)).

93. *Id.*

94. *Lines v. Teachenor*, 273 S.W.2d 300, 303 (Mo. 1954) (“The general rule is that the status of a rider is determined at the outset of the trip.”).

95. *Bateman v. Ursich*, 220 P.2d 314, 315 (Wash. 1950) (“[T]he nature of the relationship between the operator . . . and a rider therein is to be determined as of the time of the beginning of the transportation.”).

96. *KLLM*, 826 N.E.2d at 142.

97. *Id.* at 143.

98. *Id.* at 144.

99. 800 N.E.2d 200 (Ind. Ct. App. 2003). The court of appeals held that the guest statute did not bar a child’s negligence action against his stepfather and his stepfather’s employer because the

“furtherance of his and his stepfather’s journey.”¹⁰⁰ Accordingly, the hitchhiker was “in or upon” the vehicle at the time of his injury, and his claim was barred by the Guest Statute.¹⁰¹

II. WRONGFUL DEATH¹⁰²

In *Horn v. Hendrickson*,¹⁰³ the court of appeals followed the Indiana Supreme Court’s holding in *Bolin v. Wingert*,¹⁰⁴ that “only children born alive fall under Indiana’s Child Wrongful Death Statute.”¹⁰⁵ Horn was six months pregnant and her unborn fetus died as a result of an automobile collision. She sued the defendant driver for the wrongful death of her fetus, and the driver moved to dismiss for failure to state a claim. Although the defendant conceded that the six-month-old fetus was viable, she argued that under *Bolin*, there is no wrongful death claim for the death of an unborn child.¹⁰⁶

In affirming the dismissal of the claim, the court was bound to apply the controlling precedent of *Bolin*, although it recognized an important factual distinction between *Bolin* and this case: Horn’s unborn child was viable, while *Bolin* involved an eight to ten-week-old fetus.¹⁰⁷ However, the court reasoned that the Indiana Supreme Court’s holding in *Bolin* “categorically precludes all parents from bringing a wrongful death claim for the death of a viable or non-viable fetus.”¹⁰⁸

As a matter of first impression, the court found that the *Bolin* opinion, as applied to the facts of *Horn*, renders the child wrongful death statute unconstitutional under the Equal Privileges and Immunities Clause of Article I, Section 23 of the Indiana Constitution.¹⁰⁹ The court concluded that “there are no inherent differences between parents of a child born alive and parents of a viable fetus.”¹¹⁰ Nevertheless, the court affirmed the dismissal because it did not “hold that the statute is unconstitutional on its face but that it is unconstitutional as interpreted by our supreme court.”¹¹¹ As such, the court could not attempt to

boy was not “in or upon” the garbage truck driven by his stepfather when he was struck. *Id.* at 209. The boy had exited the vehicle to urinate. *Id.*

100. *KLLM*, 826 N.E.2d at 144.

101. *Id.*

102. For discussion of cases involving the wrongful death statutes and the Medical Malpractice Act, see *infra* Part VI.F.

103. 824 N.E.2d 690 (Ind. Ct. App. 2005).

104. 764 N.E.2d 201 (Ind. 2002).

105. *Horn*, 824 N.E.2d at 693, 703.

106. *Id.*

107. *See id.* at 694.

108. *Id.*

109. *Id.* at 701.

110. *Id.*

111. *Id.* at 703.

overrule *Bolin* indirectly on constitutional grounds.¹¹²

The court of appeals strongly suggested that the supreme court reconsider its holding in *Bolin*.¹¹³ However, it does not appear that Horn petitioned for transfer to the supreme court, so it will be interesting to see if the supreme court revisits the issue if given the opportunity in the future.

III. INTENTIONAL TORTS

A. *Malicious Prosecution*

As a matter of first impression, the court of appeals held that a claim for malicious prosecution may be based on a counterclaim.¹¹⁴ In this case, an attorney sued his client to recover his fees, and the client asserted a counterclaim for legal malpractice. The attorney then brought a claim for malicious prosecution of the legal malpractice claim. After analyzing cases from other jurisdictions, the court concluded that the “filing of a counterclaim constitutes an initiation of a proceeding” and, therefore, may support a claim for malicious prosecution.¹¹⁵

The court also held that a malicious prosecution claim is not collaterally estopped by the denial of a motion for sanctions under Rule 11 or Indiana Code section 34-52-1-1.¹¹⁶ In the underlying case, the attorney won summary judgment both on his claim for unpaid fees and the malpractice claim. The attorney also sought attorney fees for “obdurate behavior” under Indiana Code section 34-52-1-1 and Indiana Trial Rule 11, but his request was denied. In rejecting the client’s argument that the attorney was collaterally estopped from bringing the malicious prosecution action, the court explained that the elements which must be shown to obtain statutory attorney fees under Indiana Code section 34-52-1-1 are not identical to the elements that must be shown to establish malicious prosecution.¹¹⁷

B. *Spoliation of Evidence*

1. *First Party Intentional Spoliation of Evidence*.—Answering a certified question from the United States District Court for the Southern District of Indiana, in *Gribben v. Wal-Mart Stores, Inc.*,¹¹⁸ the Indiana Supreme Court concluded that Indiana law does not recognize a claim for “first-party” negligent or intentional spoliation of evidence.¹¹⁹ After considering the various approaches

112. *Id.*

113. *Id.* at 695-96, 701.

114. *Crosson v. Berry*, 829 N.E.2d 184 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 186 (Ind. 2005).

115. *Id.* at 191.

116. *Id.* at 193-94, 196.

117. *Id.* at 193-94.

118. 824 N.E.2d 349 (Ind. 2005).

119. *Id.* at 355.

taken in other states, the court concluded:

Notwithstanding the important considerations favoring the recognition of an independent tort of spoliation by parties to litigation, we are persuaded that these are minimized by existing remedies and outweighed by the attendant disadvantages. We thus determine the common law of Indiana to be that, if an alleged tortfeasor negligently or intentionally destroys or discards evidence that is relevant to a tort action, the plaintiff in the tort action does not have an additional independent cognizable claim against the tortfeasor for spoliation of evidence under Indiana law.

It may well be that the fairness and integrity of outcome and the deterrence of evidence destruction may require an additional tort remedy when evidence is destroyed or impaired by persons that are not parties to litigation and thus not subject to existing remedies and deterrence. But the certified questions are directed only to first-party spoliation, and we therefore decline to address the issue with respect to third-party spoliation.¹²⁰

2. *Third Party Spoliation*.—The Indiana Court of Appeals held, in *Glotzbach v. Froman*,¹²¹ that the exclusivity provisions of the Worker's Compensation Act did not preclude a third party spoliation claim because the spoliation claim is not a "personal injury" claim within the scope of the Act.¹²² The supreme court granted transfer on November 9, 2005.¹²³ The reader should be aware of the transfer and watch for further developments.

C. Fraud

1. *Constructive Fraud Based on Promise of Future Conduct*.—In *Siegel v. Williams*,¹²⁴ the court addressed the issue of constructive fraud based on a promise of future conduct in a case involving an attorney's representations to his former clients that fraudulently induced them to settle their legal malpractice claim. The clients filed a malpractice claim against their lawyer and the lawyer told his former clients' new lawyer that he would settle the claim for \$25,000 because that was all he had and if the former clients were awarded a judgment over \$25,000, he would file for bankruptcy.¹²⁵ When the clients later discovered that this was untrue, they filed an action against their attorney for fraudulent inducement to settle and were awarded a judgment of \$100,000.¹²⁶

120. *Id.*

121. 827 N.E.2d 105 (Ind. Ct. App.), *reh'g denied, trans. granted and opinion vacated*, 841 N.E.2d 189 (Ind. 2005).

122. *Id.* at 111.

123. 841 N.E.2d 189 (Ind. 2005).

124. 818 N.E.2d 510 (Ind. Ct. App. 2004).

125. *Id.* at 512.

126. *Id.* at 513.

In affirming the judgment against the attorney, the court first held that there was actual fraud based on the attorney's misrepresentation that he only had a present ability to pay a judgment of \$25,000.¹²⁷ The court also found that the lawyer's false threat to file bankruptcy if there was a judgment over \$25,000 supported a claim for constructive fraud.¹²⁸ Although a promise about future conduct will not support a claim for actual fraud, it may form the basis for constructive fraud if the promise induces someone "to place himself in a worse position than he would have been in . . . and if the party making the promise derives a benefit."¹²⁹ The elements of constructive fraud were satisfied here. Because the defendant was also an attorney of record in the malpractice case, the clients' new lawyers had "a right to rely upon any material misrepresentations that may have been made by opposing counsel . . . as a matter of law."¹³⁰ In addition, the clients' reliance benefited their lawyer because he was able to settle the malpractice claim for less than it was worth and it placed the clients in a worse position than they would have been otherwise. In the fraud action, an expert testified that the clients' underlying negligence claim against Wishard Memorial Hospital was worth between \$100,000 and \$150,000. However, the clients settled that case because their lawyer failed to file a notice of tort claim against the hospital as required under the Indiana Tort Claims Act.¹³¹

IV. EMOTIONAL DISTRESS

A. *Death of a Fetus*

In *Ryan v. Brown*,¹³² the mother developed severe blood pressure problems in the thirty-fourth week of pregnancy which ultimately resulted in the fetus's death *in utero*. The parents filed suit under the Medical Malpractice Act, alleging the wrongful death of the baby, along with claims for negligent infliction of emotional distress.¹³³ The court of appeals affirmed the trial court's determination that the parents were barred by the Child Wrongful Death Statute from seeking recovery for the fetus's death under the Medical Malpractice Act.¹³⁴

127. *Id.* at 514.

128. *Id.* at 516.

129. *Id.* at 515.

130. *Id.* (quoting *Fire Ins. Exch. v. Bell*, 643 N.E.2d 310, 313 (Ind. 1994)).

131. *Id.* at 512-13. Note that client Marjorie Williams was not a patient at the hospital when she was stuck by a hypodermic needle hidden in the bed of her daughter who had been diagnosed with AIDS. Since she was not a patient of the hospital, her negligence claim against the hospital lay outside the purview of the Medical Malpractice Act. See *Peters v. Cummins Mental Health, Inc.*, 790 N.E.2d 572, 577 (Ind. Ct. App. 2003). Accordingly, the tort claim notice was still required. See *Jeffries v. Clark Mem'l Hosp.*, 832 N.E.2d 571, 573 (Ind. Ct. App. 2005), discussed in *infra* Part VI.H.

132. 827 N.E.2d 112 (Ind. Ct. App. 2005).

133. *Id.* at 116.

134. *Id.* at 117-18.

Rejecting the doctor's argument that the parents could not maintain emotional distress claims once the wrongful death claim was dismissed, the court concluded that the mother had suffered the necessary impact under *Shuamber v. Henderson*¹³⁵ because of the impact the miscarriage had on her physical condition.¹³⁶ Thus, the mother was entitled to pursue her claims and could recover "all emotional damages that she suffered that are directly related to her miscarriage."¹³⁷ The court reached a similar conclusion as to the father's claim. Even though the father did not directly witness his son's death and only learned of it from the doctor, he had to tell his wife of the death. Moreover, he was present when the doctor unsuccessfully attempted to induce labor, rode with his wife in the ambulance as she was transferred to another hospital, was present when the baby was finally delivered, and held his dead son after the delivery.¹³⁸ These facts were sufficient to support a claim under the bystander rule.¹³⁹

B. The Impact Rule and Prior Relationship

In *Helsel v. Hoosier Insurance Co.*,¹⁴⁰ the court of appeals considered an issue of first impression, whether the lack of a prior relationship precluded recovery for negligent infliction of emotional distress. The plaintiff was traveling by motor vehicle when another vehicle crossed the centerline in front of and collided with his vehicle.¹⁴¹ The plaintiff observed the head of the passenger in the other vehicle coming toward his window, but lost sight of him when his airbag deployed. After the impact, the plaintiff noticed that no one in the other vehicle was moving and assumed the passenger had died. This information was confirmed by a paramedic in the ambulance.¹⁴² He later learned that the driver of the other vehicle had also died. The plaintiff did not know either the passenger or the driver. When he filed suit for his injuries, he alleged, among other claims that he suffered psychological injuries as a result of witnessing the other people's deaths.¹⁴³

Although finding no Indiana case "in which a plaintiff obtained recovery when the victim was not at least an acquaintance," the court concluded "there is no relationship requirement contained in the direct impact test," which requires only "'an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person.'"¹⁴⁴ Because the plaintiff was directly involved in the impact and may proceed under the direct impact test, his

135. 579 N.E.2d 452 (Ind. 1991).

136. *Ryan*, 827 N.E.2d at 119-21.

137. *Id.* at 121.

138. *Id.* at 122-23.

139. *Id.* at 124.

140. 827 N.E.2d 155 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 181 (Ind. 2005).

141. *Id.* at 156.

142. *Id.*

143. *Id.*

144. *Id.* at 157 (quoting *Shuamber v. Henderson*, 579 N.E.2d 452, 456 (Ind. 1991)).

lack of prior relationship was no bar to recovery.¹⁴⁵ Moreover, even though the plaintiff did not directly see the other persons' deaths, the evidence regarding what he saw immediately before his airbag deployed was sufficient to survive summary judgment.¹⁴⁶

C. *The Impact Rule and Property Damage*

In *Ketchmark v. Northern Indiana Public Service Co.*,¹⁴⁷ the court of appeals refused to extend negligent infliction of emotional distress to cover claims for property damage where "there was no impact to the plaintiffs' persons, the plaintiffs were not the bystanders of an accident with impact on [another person], and . . . there was no threat of injury to either of the plaintiffs' persons."¹⁴⁸ The plaintiffs filed claims for emotional distress when their home of forty-five years exploded due to a natural gas leak related to work being done by the gas company on the plaintiffs' gas lines and gas meter.¹⁴⁹ Fortunately, the plaintiffs had left the house shortly before the explosion and learned of it only upon returning home after dinner.¹⁵⁰

Judge Crone dissented, noting that the "'impact rule' is a legal fiction that was created to protect juries from the difficult task of evaluating claims in which the alleged damages might be fraudulent, i.e., emotional trauma."¹⁵¹ After explaining the history of the rule, Judge Crone noted that Indiana courts have undercut the rule significantly and urged that:

the time has come to clear the decks of the so-called "impact rule" and to allow the tort of negligent infliction of emotional distress to stand on its own inherent elements. If we trust jurors to determine whether a criminal defendant should live or die, then we should consider them capable of deciding whether a claimant's serious emotional trauma is both legitimate and reasonable, without imposing any artificial impediment to recovery.¹⁵²

V. LEGAL MALPRACTICE

In *Price v. Freeland*,¹⁵³ the court of appeals reversed the trial court's denial of the defendant's motion for summary judgment on both proximate cause and damages.¹⁵⁴ The bankruptcy trustee for Consolidated Industries hired lawyer

145. *Id.*

146. *Id.*

147. 818 N.E.2d 522 (Ind. Ct. App. 2004).

148. *Id.* at 523.

149. *Id.* at 522-23.

150. *Id.* at 523.

151. *Id.* at 526 (Crone, J., dissenting).

152. *Id.* at 526-27.

153. 832 N.E.2d 1036 (Ind. Ct. App. 2005).

154. *Id.* at 1044.

Gary Price to bring a declaratory judgment action against its insurers to establish coverage as to class action claims allegedly arising from defective furnaces manufactured by Consolidated. At the direction of the bankruptcy judge, Price entered into a stipulation with the insurers as to what constituted an “occurrence” under the policy.¹⁵⁵ Daniel Freeland, as bankruptcy trustee of the Estate of Consolidated, subsequently sued Price and his firm alleging that in stipulating as to the meaning of “occurrence,” Price had committed malpractice.

Freeland filed an affidavit in opposition to Price’s motion for summary judgment. The court found the affidavit to be improper with respect to Freeland’s assertion that the stipulation “is not an accurate statement of the law.”¹⁵⁶ The court explained that such an assertion is a legal conclusion, which is inadmissible under Indiana Evidence Rule 704(b).¹⁵⁷ The court found that there was no genuine issue of material fact as to proximate cause because the stipulation as to the meaning of occurrence under the policy was not binding on the bankruptcy court.¹⁵⁸ In fact, the stipulation was a nullity because “‘questions of law are beyond the power of agreement by the attorneys or parties.’”¹⁵⁹ As such, it could not be the proximate cause of any harm to Freeland.

Finally, the court found there was no evidence of damage to Freeland.¹⁶⁰ The parties reached a settlement in the declaratory judgment action, and Consolidated did not have to pay anything to individual claimants.¹⁶¹

VI. MEDICAL MALPRACTICE

A. *Physician Duty to Warn*

In *Cox. v. Paul*,¹⁶² the Indiana Supreme Court held “that a health care provider who receives notice of possible dangerous side effects of a treatment is not strictly liable for failure to warn a patient who [previously] received the treatment from the provider.”¹⁶³ However, the provider “may be held liable for failure to make reasonable efforts to warn the patient.”¹⁶⁴

Cox, a former patient, filed suit against an oral surgeon alleging that he breached a duty to warn of a government recall of a type of dental implant that the surgeon had used on the patient in 1984. In late 1989, the patient began to experience various symptoms, including vertigo, neck pain, headaches, fatigue, and insomnia. The symptoms progressed but her family doctor could not identify

155. *Id.* at 1038-39.

156. *Id.* at 1042.

157. *Id.*

158. *Id.* at 1043.

159. *Id.* (quoting *Yelton v. Plantz*, 77 N.E.2d 895, 899 (Ind. 1948)).

160. *Id.* at 1043-44.

161. *Id.*

162. 828 N.E.2d 907 (Ind. 2005).

163. *Id.* at 909.

164. *Id.*

their cause. In September 1991, the surgeon received an announcement from the FDA of a recall of Vitek implants.¹⁶⁵ In early 1992, the surgeon instructed his staff to search patient files to identify any patients who had received the implants. For an unknown reason, his staff conducted a second search in 1994. However, Cox was not identified and notified of the recall until 1996. A subsequent MRI revealed that Cox's implants were extensively damaged.¹⁶⁶

The court held that Cox "raised an inference that [the surgeon] was negligent by showing that he did not notify [her] until several years after he received the [recall] notice."¹⁶⁷ Therefore, under the doctrine of *res ipsa loquitur*, once Cox showed that she was not notified of the recall, the burden shifted to the surgeon "to explain what steps he took to notify [her] or why no steps were taken."¹⁶⁸ The surgeon testified that he did not know why Cox was not identified until 1996 and hypothesized that her file might not have been in the office at the time his staff searched for patients with the implant (explaining that he had separated his practice from another doctor in 1989). The court then concluded that the surgeon failed to meet his burden and that Cox was entitled to partial summary judgment as a matter of law.¹⁶⁹

B. Res Ipsa Loquitur

In *Balfour v. Kimberly Home Health Care, Inc.*,¹⁷⁰ the court of appeals addressed the doctrine of *res ipsa loquitur*, noting that the doctrine is "especially applicable in cases where . . . a health care provider leaves a foreign object in a patient's body."¹⁷¹ The defendant health care company provided post-operative abdominal wound care for Balfour after liposuction. Balfour alleged that a nurse left a piece of 4x4 gauze in her wound.¹⁷²

In holding that the trial court erred in entering summary judgment for the home health care company, the court found that there was a genuine issue of material fact as to whether the company was negligent in failing to remove the gauze.¹⁷³ Although Balfour could not prove the exact date of negligence, the evidence showed that the gauze was placed in the wound at some point between March 12 and 16, 1999, and was present on March 16, when the defendant was "the only health care provider in charge of [Balfour's] wound care" and the defendant's nurse changed the dressing.¹⁷⁴ Thus, the nurse had "exclusive control of the injuring instrumentality at that time and it was [her] responsibility

165. *Id.* at 909-10.

166. *Id.* at 910.

167. *Id.* at 912.

168. *Id.*

169. *Id.* at 913-14.

170. 830 N.E.2d 145 (Ind. Ct. App. 2005).

171. *Id.* at 149.

172. *Id.* at 147.

173. *Id.* at 147-48.

174. *Id.* at 149.

to exercise reasonable care in removing all 4x4's from the wound."¹⁷⁵ The court found that the inference of negligence created by the *res ipsa loquitur* doctrine was sufficient to defeat a summary judgment motion, even though the defendant presented some evidence tending to establish the lack of negligence.¹⁷⁶

In another medical malpractice case, *Ross v. Olson*,¹⁷⁷ the plaintiff was not entitled to a *res ipsa loquitur* instruction where he alleged that during his bilateral knee replacement surgery a surgical chisel partially severed his artery.¹⁷⁸ The court of appeals explained that the doctrine of *res ipsa loquitur* was "designed to create an evidentiary presumption of negligence from circumstantial evidence," but here, "there was direct evidence of causation."¹⁷⁹ Expert witnesses who testified agreed that the chisel severed his artery, although they disagreed concerning the exercise of due care.¹⁸⁰

C. Statute of Limitations in Class Actions

In *Ling v. Webb*,¹⁸¹ the court of appeals held that the filing of a proposed medical malpractice class action complaint with the medical review board does not toll the two-year statute of limitations under the "Class Action Tolling Rule."¹⁸² Under that rule, "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action."¹⁸³ Citing Indiana Trial Rule 3, which states that a "civil action is commenced by filing with the court a complaint or such equivalent . . . document," the court concluded that the filing of a proposed class action complaint with the medical review board does not commence an action for purpose of the Class Action Tolling Rule.¹⁸⁴

The court noted that its holding was consistent with provisions of the Medical Malpractice Act, including Indiana Code section 34-18-8-7, which permits claimants to simultaneously file a proposed complaint with the Department of Insurance and a complaint in the trial court, as long as the court complaint does not contain information identifying the defendants.¹⁸⁵

175. *Id.* at 149-50.

176. *Id.* at 150.

177. 825 N.E.2d 890 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 181 (Ind. 2005).

178. *Id.* at 893-94.

179. *Id.* at 894.

180. *Id.*

181. 834 N.E.2d 1137 (Ind. Ct. App. 2005).

182. *Id.* at 1145.

183. *Id.* at 1141 (quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974) (emphasis added by court)).

184. *Id.* at 1142 (quoting IND. TRIAL R. 3 (emphasis added by court)).

185. *Id.* at 1143-44; IND. CODE § 34-18-8-7 (2005).

D. Increased Risk of Harm/Loss of Chance

In *Sawland v. Mills*,¹⁸⁶ the court of appeals addressed the issue of the proper jury instruction on damages in a case involving a radiologist's failure to diagnose breast cancer from a mammogram where the plaintiff had not yet sustained any physical harm as a result of the radiologist's alleged negligence. Mills had a mammogram in September 1997, which was interpreted by Dr. Sawland.¹⁸⁷ She had another mammogram twenty months later and was diagnosed with breast cancer. She then underwent a lumpectomy, radiation, and chemotherapy.¹⁸⁸

The court observed that in *Alexander v. Scheid*,¹⁸⁹ the Indiana Supreme Court has adopted the "loss of chance" doctrine for cases such as this where the injury resulting from the negligence has not yet "come to its full potential."¹⁹⁰ The court distinguished this type of case from situations, such as that addressed by the Indiana Supreme Court in *Mayhue v. Sparkman*¹⁹¹ where a physician is negligent and the patient dies, but the patient's illness already results in a probability of dying that is greater than fifty percent.¹⁹²

In rejecting the physician's proposed jury instruction, the court explained that, as indicated by the supreme court in *Scheid*, damages in a loss of chance case are not the same as damages in a case governed by Section 323 of the Restatement.¹⁹³ Damages for loss of chance are "based upon 'the reduction of the patient's expectancy from her pre-negligence expectancy' and the jury must 'attach a monetary amount' to the patient's loss of life expectancy."¹⁹⁴ The court then concluded that "the trial court's damages instruction, while not as complete as it should be, was not an erroneous statement of the law."¹⁹⁵

E. Informed Consent

In *Mullins v. Parkview Hospital, Inc.*,¹⁹⁶ a patient stated a claim for battery where she did not consent to a medical student's presence in the operating room or the student's performance of a medical procedure.¹⁹⁷ Although the patient Mullins made it very clear that she did not even want students in the operating

186. 830 N.E.2d 932 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 188 (Ind. 2005).

187. *Id.* at 935.

188. *Id.* at 935-36.

189. 726 N.E.2d 272 (Ind. 2000).

190. *Sawland*, 830 N.E.2d at 939 (citing *Scheid*, 726 N.E.2d at 273).

191. 653 N.E.2d 1384 (Ind. 1995) (adopting RESTATEMENT (SECOND) OF TORTS § 323 (1965)).

192. *Sawland*, 830 N.E.2d at 939.

193. *Id.* at 947 (explaining that damages under the Restatement "are determined by subtracting the decedent's postnegligence chance of survival from the prenegligence chance of survival" and multiplying the total damages by the percent of chance lost).

194. *Id.* (quoting *Scheid*, 726 N.E.2d at 282).

195. *Id.* at 948.

196. 830 N.E.2d 45 (Ind. Ct. App. 2005), *reh'g denied* (2006).

197. *Id.* at 51-52.

room, her anesthesiologist and surgeon¹⁹⁸ allowed a student to perform an intubation on Mullins prior to a hysterectomy. In performing the procedure, the student lacerated Mullins's esophagus and Mullins had to undergo a subsequent procedure to repair the damage.¹⁹⁹

In concluding that Mullins stated a claim for battery, the court distinguished a line of cases which held that claims "based on the doctrine of informed consent sound in negligence" and not battery.²⁰⁰ Here, it was not simply a matter of whether Mullins gave informed consent but whether she had consented at all to the procedure performed by the student.²⁰¹

As to Mullins's negligence claims, the court held that whether the hospital complied with the standard of care in allowing the student to perform the procedure was not within the common knowledge of laypersons.²⁰² Accordingly, expert testimony was required regarding the issue of informed consent.²⁰³

F. Medical Malpractice Act Does Not Provide Independent Cause of Action for Damages for Wrongful Death

The supreme court, in *Chamberlain v. Walpole*,²⁰⁴ addressed the question of whether non-pecuniary damages could be recovered under the Medical Malpractice Act where such damages would not otherwise be available under the Wrongful Death Act.²⁰⁵ It concluded that they may not because the Act does not create new substantive rights or new causes of action.²⁰⁶

Walpole's father died following surgery for a hernia repair, and Walpole brought a malpractice action against the doctors seeking damages for loss of the love, care, affection, and services of his father.²⁰⁷ Walpole conceded that, as a non-dependent adult, he could not recover such damages under the Wrongful Death Act, but argued that the Medical Malpractice Act should be interpreted to create such a remedy independent of the Wrongful Death Act.²⁰⁸ Walpole argued that he fit within the Act's definition of "patient" because he was his father's

198. In a footnote, the court of appeals expressed concern that the same law firm represented both the anesthesiologist and the surgeon, noting the potential for a conflict of interest. *Id.* at 50 n.1.

199. *Id.* at 50-51.

200. *Id.* at 53-54 (citing *Bowman v. Beghin*, 713 N.E.2d 913, 916 (Ind. Ct. App. 1999) but distinguishing the *Mullins* case based on *Cacdac v. West*, 705 N.E.2d 506, 511-12 (Ind. Ct. App. 1999)).

201. *Id.* at 54.

202. *Id.* at 57.

203. *Id.* at 58.

204. 822 N.E.2d 959 (Ind. 2005).

205. *Id.* at 960-61.

206. *Id.* at 963.

207. *Id.* at 960-61.

208. *Id.* at 961.

representative and child, and that he could assert a derivative claim.²⁰⁹ The Act states that a derivative claim includes “the claim of a parent or parents, guardian, trustee, child, relative, attorney, or any other representative of the patient including claims for loss of services, loss of consortium, expenses, and other similar claims.”²¹⁰ He reasoned that this language meant that he could pursue a claim for “loss of his father’s love, care and affection.”²¹¹

The supreme court rejected his argument, explaining that the Act’s

definition of a “patient” to include both the person who was injured and a person who has a derivative claim . . . does not imply that the [Act] creates a new claim . . . [but] merely requires that claims for medical malpractice that are otherwise recognized under tort law and applicable statutes be pursued through the procedures of the [Act].²¹²

The court also noted that the Act was designed to limit, not expand liability for medical malpractice.²¹³

Consistent with this reasoning, the court stated in *Chamberlain* that it agreed with the reasoning of the court of appeals in *Breece v. Lugo*,²¹⁴ and it was denying transfer in that case, which held that the Medical Malpractice Act does create a claim for death of a fetus. Similarly, in *Ryan v. Brown*,²¹⁵ the court of appeals held that the Medical Malpractice Act does not create a remedy separate from the Indiana Wrongful Death of a Child Statute for the wrongful death of a viable fetus.²¹⁶ As the court observed, the Indiana Supreme Court previously held, in *Bolin v. Wingert*,²¹⁷ that “only children who are born alive can bring a claim under Indiana’s Child Wrongful Death Statute.”²¹⁸ Therefore, the Ryans could not bring a claim under the Wrongful Death Statute because their son was not born alive.²¹⁹ Furthermore, the court held that, pursuant to *Chamberlain*, because the Ryans could not bring a claim for their son’s death under the Child Wrongful Death Statute, they were also barred from bringing a claim for wrongful death under the Medical Malpractice Act.²²⁰

209. *Id.*

210. *Id.* (citing IND. CODE § 34-18-2-22 (2005)).

211. *Id.* at 961-62.

212. *Id.* at 963.

213. *Id.*

214. 800 N.E.2d 224 (Ind. Ct. App. 2003).

215. 827 N.E.2d 112 (Ind. Ct. App. 2005); *see supra* Part II.D.

216. *Ryan*, 827 N.E.2d at 117-18.

217. 764 N.E.2d 201 (Ind. 2002).

218. *Ryan*, 827 N.E.2d at 117 (citing *Bolin*, 764 N.E.2d at 207).

219. *Id.*

220. *Id.* at 117-18.

G. Tort Claims Act Inapplicable

In *Jeffries v. Clark Memorial Hospital*,²²¹ the Indiana Court of Appeals clarified that a medical malpractice claim against a governmental entity, such as the defendant county hospital, is governed exclusively by the Medical Malpractice Act.²²² As such, the plaintiff was not required to comply with the notice provisions of the Indiana Tort Claims Act.²²³ The trial court had dismissed the plaintiff's complaint after determining that the Tort Claims Act applied because the "[h]ospital is a political subdivision, but not a political subdivision of the state."²²⁴ The court rejected the trial court's finding that a "political subdivision" and a "political subdivision of the state" had distinct meanings, and found that there was "no differentiation between" the two terms.²²⁵

H. Periodic Payments Agreement

The court of appeals addressed an issue of first impression regarding a periodic payments agreement in *Patient's Compensation Fund v. Hicklin*.²²⁶ Under the version of the Act applicable at the time, a health care provider was liable for up to \$100,000 per occurrence, and this liability could be discharged by either paying the claimant the full \$100,000 or by purchasing a periodic payments agreement through a third party at a total cost of more than \$75,000.²²⁷ Welborn Baptist Hospital had an agreement to make an immediate payment of \$75,000 to the patient's estate plus a future payment of \$1 directly to the estate one week later. The estate then sought excess damages from the Patient's Compensation Fund.²²⁸

In reversing the trial court's denial of the Fund's motion to dismiss, the court observed that "the 'cost of the periodic payments agreement' is defined as 'the amount expended by the health care provider . . . at the time the periodic payments agreement is made, to obtain the commitment from a third party to make available money for use as future payment.'"²²⁹ The court concluded that the hospital's own two payments did not meet these requirements because there was no periodic payments agreement purchased from a third party.²³⁰ As the court described,

it is . . . clear that Section 4(b) permits health care providers and their

221. 832 N.E.2d 571 (Ind. Ct. App. 2005).

222. *Id.* at 573.

223. *Id.* (citing IND. CODE § 34-13-3-8 (2005)).

224. *Id.*

225. *Id.* at 573-74.

226. 823 N.E.2d 705 (Ind. Ct. App. 2005).

227. *Id.* at 707-08 (citing IND. CODE § 34-18-14-2 to -4 (2005) (formerly IND. CODE § 27-12-14-2 to -4 repealed by P.L. 1-1998, sec. 221)).

228. *Id.* at 708.

229. *Id.* (quoting IND. CODE § 34-18-14-1).

230. *Id.* at 708-09.

insurers to save thousands of dollars by purchasing periodic payments agreements in lieu of lump-sum payments, [but] nothing in the rationale and policy underlying the Act indicates that the legislature intended that a health care provider could satisfy its obligation under the statute by making two direct payments to the claimant totaling \$75,001.²³¹

I. Contributory Negligence of Patient

In *Sawlani v. Mills*,²³² the court also addressed whether the patient's failure to obtain a second mammogram within one year after her initial mammogram, as advised by the defendant radiologist, was evidence of contributory negligence.²³³ In affirming the trial court's grant of judgment on the evidence, the court explained that the doctor's alleged negligence was complete at the time of the mammogram in September 1997, and Mills's alleged contributory negligence did not occur until September 1998 when she failed to have a second mammogram.²³⁴ Because the patient's negligence was "wholly subsequent" to the alleged malpractice, contributory negligence was inapplicable.²³⁵ However, the court noted that an instruction on mitigation of damages was appropriate.²³⁶

J. No Cause of Action Under Statute Imposing Duty of Hospital Peer Review

*Longa v. Vicory*²³⁷ was yet another case arising out of the tragic deaths at the Vermillion County Hospital from 1993 to 1995, in which patients were murdered by nurse Orville Lynn Majors. The families of patients who were murdered filed proposed complaints "alleging in part that certain members of the hospital's medical staff had committed medical malpractice [by] failing to provide proper peer review" under Indiana Code section 16-21-2-7.²³⁸

Although the plaintiff conceded that there was no private right of action under the statute,²³⁹ he argued that the doctors nevertheless had a "non-delegable duty to provide peer review."²⁴⁰ In rejecting the plaintiff's argument, the court observed that "Indiana Code section 16-21-2-7 makes the medical staff

231. *Id.* at 710.

232. 830 N.E.2d 932 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 188 (Ind. 2005); *see supra* Part VI.D.

233. *Id.* at 941-43.

234. *Id.* at 943.

235. *Id.* (citing *Harris v. Cacadac*, 512 N.E.2d 1138, 1140 (Ind. Ct. App. 1987)).

236. *Id.*

237. 829 N.E.2d 546 (Ind. Ct. App. 2005).

238. *Id.* at 547. This case was before the court on interlocutory appeal of a certified question from the Vermillion Circuit Court. *Id.* at 546.

239. *See Roberts v. Sankey*, 813 N.E.2d 1195 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 742 (Ind. 2005). In *Roberts*, another case arising out of the Vermillion County Hospital deaths, the court held that this statute does not create a private right of action.

240. *Longa*, 829 N.E.2d at 549.

responsible for peer review to the governing board, not to patients or the general public.”²⁴¹ The court also noted that Indiana Code section 16-21-2-8 provides peer review committee members with immunity.²⁴² The court reasoned that it would be absurd to allow suits against doctors who are not members of the peer review committee while immunizing those who are.²⁴³ In so holding, however, the court stressed the importance of peer reviews and noted that the plaintiffs were not without a remedy, but they could not hold the defendant doctors responsible for the alleged failures of the committee.²⁴⁴

VII. PREMISES LIABILITY

A. *Liability of a Principal to the Independent Contractor or Its Employees*

The Indiana Supreme Court granted transfer to consider liability of a landowner to an independent contractor or its employees in *PSI Energy, Inc. v. Roberts*,²⁴⁵ an asbestos case tried before a jury. The plaintiff’s claims centered on two theories: premises liability and principal-independent contractor vicarious liability.²⁴⁶ Under the comparative fault act, the jury allocated thirty-six percent of the fault to the employer/independent contractor.²⁴⁷

The court considered whether any of the exceptions to the general rule that a principal is not liable for the negligence of an independent contractor would apply.²⁴⁸ Indiana law recognizes five public policy-based exceptions to this general rule, and the plaintiff asserted that two applied in this case: “(1) the ‘intrinsically dangerous’ exception—‘where the contract requires the performance of intrinsically dangerous work,’ and (2) the ‘due precaution’ exception—‘where the act will probably cause injury to others unless due precaution is taken.’”²⁴⁹ Although acknowledging that it previously had described asbestos as “‘an inherently dangerous substance . . . a toxic foreign substance . . . an inherently dangerous product . . . and a hazardous foreign substance,’”²⁵⁰ the court rejected the plaintiff’s claim that asbestos is “‘inherently or intrinsically dangerous.’”²⁵¹ The court explained, “[w]e agree that working with asbestos can be perilous, but that is not enough to render it intrinsically dangerous as that term is used to establish liability for actions of an independent

241. *Id.*

242. *Id.*; IND. CODE § 16-21-2-8 (2005).

243. *Longa*, 829 N.E.2d at 549.

244. *Id.*

245. 829 N.E.2d 943 (Ind.), *aff’d on reh’g*, 834 N.E.2d 665 (Ind. 2005).

246. *Id.* at 948.

247. *Id.* at 950.

248. *Id.*

249. *Id.*

250. *Id.* at 954 (quoting *Covalt v. Carey Canada, Inc.*, 543 N.E.2d 382 (Ind. 1989)).

251. *Id.* at 955.

contractor.”²⁵² Even though the “consequences of mesothelioma can be horrific,” the court noted that proper precautions could have minimized the harms to the plaintiff; therefore, “asbestos is not intrinsically dangerous such that anyone hiring a contractor to address it incurs strict liability for injuries sustained from exposure to it.”²⁵³ The court then rejected the plaintiff’s “due precaution” argument, concluding that, absent circumstances that create unique hazards, the responsibility of taking due precautions lies with the employer/independent contractor, not with the principal.²⁵⁴

Having rejected all of the plaintiff’s claims as to the vicarious liability of the principal for the independent contractor’s actions, the court considered the claims under premises liability theories. The court noted that landowners often hire independent contractors because they have specialized tools and skills, which the landowners are entitled to rely upon.²⁵⁵ “A principal who hires an independent contractor to address a problem on [its] premises is no different from one who engages a contractor for work elsewhere and should have no broader exposure to liability for the contractor’s acts.”²⁵⁶ The principal has no duty to, in effect, supervise the work of the independent contractor or to assure that it uses appropriate safety equipment.²⁵⁷ Therefore, “a landowner . . . has no liability to an independent contractor or the contractor’s employees for injuries sustained while addressing a condition as to which the landowner has no superior knowledge.”²⁵⁸

Justice Dickson, concurring in result and dissenting with a separate opinion joined by Justice Rucker, stated:

I respectfully contend that the Court today employs unnecessary draconian methodologies to provide protection for landowners and other entities that employ independent contractors to eliminate or ameliorate dangerous conditions. Except for genuine intrinsically dangerous activities, such interests already receive significant protection under the “due precautions” exception and Restatement § 343A(1). More significant, I submit, is the constraint intrinsic to the comparative fault allocation system itself.²⁵⁹

Noting the jury’s allocation of fault, which Justice Dickson characterized as showing “clear recognition of the significant role of the independent contractor,” he concluded, “[j]ustice is better served by trusting the sound judgment of civil juries than by erecting protective judicial doctrines.”²⁶⁰

252. *Id.*

253. *Id.*

254. *Id.* at 956.

255. *Id.* at 961.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 968 (Dickson, J., dissenting).

260. *Id.*

B. Duty to Protect from Third Party Criminal Acts

The court addressed the scope of a premises owner's duty in several cases during the survey period. In *Lane v. St. Joseph's Regional Medical Center*,²⁶¹ the court of appeals found that there is a duty to maintain protection for patients in a hospital emergency room from harm by third parties.²⁶² The plaintiff was sitting in the waiting area when a teenage boy entered the hospital with his mother.²⁶³ With no warning or provocation, the teenager suddenly began attacking the plaintiff. The court noted that the hospital emergency room has a much higher potential for violence than other areas because "[v]iolent and intoxicated individuals, those involved in crimes, and people injured in domestic disputes are routinely brought to the emergency room for treatment."²⁶⁴ However, the court affirmed summary judgment for the hospital on grounds that any breach of this duty was not the proximate cause of the plaintiff's injuries based on the lack of foreseeability of the violence.²⁶⁵ The court held that, just as the plaintiff had no reason to foresee this attack, neither did the hospital, and therefore it was entitled to judgment as a matter of law.²⁶⁶

Judge Vaidick concurred in part and dissented in part, disagreeing with the court's conclusion as to foreseeability.²⁶⁷ Noting that the issue of proximate cause is generally a question of fact for the jury, Judge Vaidick also noted that although the plaintiff was surprised by the violence, this does not necessarily mean that "a trained security officer stationed in or near the emergency room would [not] have been able to prevent the attack by picking up on warning signs" that a lay bystander might have missed.²⁶⁸

In *Dennis v. Greyhound Lines, Inc.*,²⁶⁹ the court of appeals found that genuine issues of material fact precluded summary judgment when a bus passenger was attacked in the restroom of the bus terminal.²⁷⁰ The court noted that this case "exposes the distinct difference in Indiana's summary judgment procedure and the federal procedure."²⁷¹ Under the Indiana standard, "the party moving for summary judgment has the burden of establishing no genuine issue of material fact exists . . . [and] only when it has met this burden does the burden shift to the nonmovant to establish that a genuine issue does exist."²⁷² Unlike under the

261. 817 N.E.2d 266 (Ind. Ct. App. 2004).

262. *Id.* at 273.

263. *Id.* at 268.

264. *Id.* at 273.

265. *Id.* at 273-74.

266. *Id.* at 274.

267. *Id.* at 274-75 (Vaidick, J., concurring and dissenting).

268. *Id.* at 275.

269. 831 N.E.2d 171 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 188 (Ind. 2005).

270. *Id.* at 175.

271. *Id.* at 173.

272. *Id.*

federal rule, “[m]erely alleging that the plaintiff has failed to produce evidence on each element [of his claim] is insufficient to entitle the defendant to summary judgment.”²⁷³ Noting that Greyhound designated evidence relevant to the issue of whether it breached its duty, the court concluded that the evidence fell short of establishing, as a matter of law, that it actually met its duty.²⁷⁴ The court also stated that Greyhound would have been entitled to summary judgment under the federal rules, as the plaintiff had designated little evidence substantiating his claim that Greyhound breached its duty of care.²⁷⁵

In *Zambrana v. Armenta*,²⁷⁶ a bar patron brought suit after he was shot in a gunfight between a bar employee and another patron. Addressing the bar owner’s duty, the court noted that the Indiana Supreme Court no longer requires application of the “totality of the circumstances” test to determine duty, but now requires only an inquiry into the issue of foreseeability, since the duty to business invitees is well-settled.²⁷⁷ Landowners must “take reasonable precautions to protect their business invitees from foreseeable criminal attacks.”²⁷⁸ Because the bar was located in East Chicago, in an area “where gang activity and crime were prevalent,” it was foreseeable that weapons brought onto the premises might lead to escalating confrontations.²⁷⁹ In fact, the bar attempted to keep weapons out by frisking male patrons. The guns at issue in this case were in the hands of the bouncer and a patron who obtained the gun from a female patron who was not searched on entry.²⁸⁰ Under these circumstances, the evidence supported a finding of foreseeability, and therefore liability.²⁸¹

VIII. TORTS ACTIONS AGAINST GOVERNMENT

A. *Immunity Under the Indiana Tort Claims Act*

1. *Law Enforcement Immunity.*—

a. *Collision caused during pursuit of suspect.*—The Indiana Court of Appeals issued conflicting opinions regarding whether police operating a vehicle in pursuit of a suspect are immune under the law enforcement immunity provision of the Indiana Tort Claims Act.²⁸² Under Indiana Code section 34-13-3-3, a governmental entity or employee is not liable for a loss resulting from “[t]he adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations), unless the act of enforcement constitutes false arrest or

273. *Id.* (quoting *Jarboe v. Landmark Cmty. Newspapers*, 644 N.E.2d 118, 123 (Ind. 1994)).

274. *Id.* at 174.

275. *Id.* at 175.

276. 819 N.E.2d 881 (Ind. Ct. App.), *reh’g denied, and trans. denied* (Ind. 2005).

277. *Id.* at 886-87 (citing *Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048 (Ind. 2003)).

278. *Id.* at 887.

279. *Id.* at 888.

280. *Id.* at 885.

281. *Id.* at 888.

282. IND. CODE §§ 34-13-3-1 to -25 (2005).

false imprisonment.”²⁸³

In *Chenoweth v. Estate of Wilson*,²⁸⁴ the court of appeals held that the police department was immune from liability to the estate of a driver killed in a collision with a police officer that occurred while the officer was pursuing a suspected drunk driver.²⁸⁵ The court reasoned that “‘enforcement of the law’ as that phrase is used to evoke the application of immunity under the Act ‘means compelling or attempting to compel the obedience of another to laws.’”²⁸⁶ The court found that the officer was attempting to enforce the law while he pursued the suspect and was entitled to immunity as a matter of law.²⁸⁷

On the other hand, in *East Chicago Police Department v. Bynum*,²⁸⁸ the court affirmed the trial court’s denial of summary judgment for a police department under similar facts.²⁸⁹ The plaintiffs contended that Indiana Code section 34-13-3-3(8) did not grant immunity for the police officers’ alleged breach of their statutory duty of reasonable care under various motor vehicle safety statutes, including Indiana Code section 9-21-1-8.

Although acknowledging that the officers’ “act of pursuing gang members and a warrant violator would constitute enforcement of a law as contemplated by [Indiana Code section] 34-13-3-3(8),” the court concluded that “the legislature did not intend to abolish the duty of authorized emergency vehicle drivers to drive with due regard for the safety of all persons.”²⁹⁰

283. *Id.* § 34-13-3-3(A)(8).

284. 827 N.E.2d 44 (Ind. Ct. App. 2005).

285. *Id.* at 48.

286. *Id.* (quoting *St. Joseph County Police Dep’t v. Shumaker*, 812 N.E.2d 1143, 1150 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 737 (Ind. 2005)).

287. *Id.*

288. 826 N.E.2d 22 (Ind. Ct. App. 2005).

289. *Id.* at 30.

290. *Id.* IND. CODE § 9-21-1-8 (2005) provides:

- a) This section applies to the person who drives an authorized emergency vehicle when:
 - (1) responding to an emergency call;
 - (2) in the pursuit of an actual or suspected violator of the law; or
 - (3) responding to, but not upon returning from, a fire alarm.
- (b) The person who drives an authorized emergency vehicle may do the following:
 - (1) Park or stand, notwithstanding other provisions of this article.
 - (2) Proceed past a red or stop signal or stop sign, but only after slowing down as necessary for safe operation.
 - (3) Exceed the maximum speed limits if the person who drives the vehicle does not endanger life or property.
 - (4) Disregard regulations governing direction of movement or turning in specified directions.
- (c) This section applies to an authorized emergency vehicle only when the vehicle is using audible or visual signals as required by law. An authorized emergency vehicle operated as a police vehicle is not required to be equipped with or display

In *Patrick v. Miresso*,²⁹¹ relied on heavily by the court in *Bynum*, the court concluded that to the extent there is an irreconcilable conflict between Indiana Code section 34-13-3-3(8) (providing immunity) and section 9-21-1-8 (regarding liability of drivers of emergency vehicles), section 9-21-1-8 prevails.²⁹² In so holding, the court noted that section 9-21-1-8 was enacted first and is more specific. The court presumed that the legislature was aware of that section in enacting section 34-13-3-3(8). The court also reasoned that “repeal by implication” is disfavored and that the court must strictly construe the Indiana Tort Claims Act. Accordingly, the court concluded that “the legislature did not intend to abolish the longstanding duty of emergency vehicle drivers to ‘drive with due regard for the safety of all persons’” as required under section 9-21-1-8(d)(1).²⁹³ Note that the *Patrick* case is currently before the Indiana Supreme Court on a petition to transfer.²⁹⁴

b. Failure to prevent suicide.—The city was entitled to immunity for a police officer’s failure to prevent a suicide in *Savieo v. City of New Haven*.²⁹⁵ Police responded to a family member’s call regarding a threat by Jon Savieo to shoot himself.²⁹⁶ Police officers and Savieo’s son then searched his home, but did not search his person or the chair in which he was sitting. Savieo told them he had sold the gun and made the suicide threat to get attention. One of the responding officers, who was also a friend of Savieo, dismissed the other officers and then asked Savieo to join him on the front porch to discuss matters. Savieo then shot himself.²⁹⁷

The court of appeals held that the city was immune from liability under the law enforcement immunity provision of the Indiana Tort Claims Act.²⁹⁸ The court rejected the plaintiff’s argument that law enforcement immunity did not apply because suicide is not a criminal act.²⁹⁹ As the trial court found, the police officer could have detained Savieo pursuant to Indiana Code section 12-26-4-1, which allows a police officer to detain a person if the officer has reasonable grounds to believe that the person is mentally ill, dangerous, or in immediate

red and blue lights visible from in front of the vehicle.

(d) This section does not do the following:

- (1) Relieve the person who drives an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons.
- (2) Protect the person who drives an authorized emergency vehicle from the consequences of the person’s reckless disregard for the safety of others.

291. 821 N.E.2d 856 (Ind. Ct. App.), *trans. granted*, 831 N.E.2d 747 (Ind. 2005).

292. *Id.* at 867-68.

293. *Id.*

294. *See* 831 N.E.2d 747 (Ind. 2005).

295. 824 N.E.2d 1272, 1275-76 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 178 (Ind. 2005).

296. *Id.* at 1273.

297. *Id.*

298. *Id.* at 1275-76 (citing IND. CODE § 34-13-3-3(8) (2005)).

299. *Id.* at 1276.

need of treatment.³⁰⁰ The court of appeals reasoned that, although this statute does not criminalize such conduct and cannot be enforced in that sense, it grants police officers discretion to compel a person's obedience to the police power of the state, which is "the very essence of law enforcement."³⁰¹

The court also found that the City was immune under the common law, stating that "[t]o the extent that the police are expected to prevent threatened suicides in noncustodial cases, we conclude that this duty is so closely akin to the duty to prevent crime that it should be treated as fitting within that limited exception to the general rule of governmental liability."³⁰²

2. *Discretionary Function Immunity*.—In *Madden v. Indiana Department of Transportation*,³⁰³ a class action brought by train passengers who were injured in a collision with a tractor-trailer, the Indiana Court of Appeals addressed the applicability of discretionary function immunity. The collision occurred near an intersection where two sets of tracks intersect Midwest Steel Road at which the traffic control light was designed, controlled, and maintained by the Indiana Department of Transportation ("INDOT").³⁰⁴ Midwest Steel Road runs perpendicular to U.S. 12. The intersection was such that the tractor, which was pulling dual tandem-trailers, turned north onto Midwest Steel Road from U.S. 12 and when the train gates lowered, he was caught in a space between the two sets of train tracks. While the tractor was trapped, it was hit by a westbound commuter train.³⁰⁵ The plaintiffs alleged that INDOT was negligent in failing to keep northbound traffic on Midwest Steel Road clear when a train was approaching.³⁰⁶

The court of appeals reversed the trial court's grant of summary judgment to INDOT based on discretionary function immunity under Indiana Code section 34-13-3-3(7).³⁰⁷ In order to prove discretionary function immunity, INDOT had the burden "to demonstrate it had considered setting the traffic signals to account for northbound traffic."³⁰⁸ Although INDOT asserted that it could not present such evidence because it was privileged under 23 U.S.C. § 409, the court held that the privilege did not relieve INDOT of its burden of proof.³⁰⁹ As the court stated, "legislatures create evidentiary privileges to shield selected information from discovery, [but] those shields may not be wielded as swords at the will of a party."³¹⁰

300. *Id.*

301. *Id.* at 1276.

302. *Id.* at 1277-78.

303. 832 N.E.2d 1122 (Ind. Ct. App. 2005).

304. *Id.* at 1125.

305. *Id.*

306. *Id.* at 1125-26.

307. *Id.* at 1129.

308. *Id.* at 1127.

309. *Id.* at 1128.

310. *Id.*

In *Chandradat v. State*,³¹¹ a suit arising out of an accident that occurred in an interstate construction zone, the State was not entitled to discretionary function immunity under Indiana Code section 34-13-3-3(7) for its alleged negligence in the placement of traffic control signs regarding lane restrictions.³¹² An INDOT project engineer testified that the contractor was responsible for placing lane restriction signage in compliance with the standards set forth in the Indiana Manual on Uniform Traffic Control Devices for Streets and Highways, and that the contractor's work was conducted pursuant to the plans, specifications, and direction of INDOT. Additionally, the engineer testified that he did not determine where the signs would be placed, but that he implemented the plan. The court determined that the placement of signs was not part of the planning for the construction but was part of its implementation.³¹³ As such, discretionary function immunity did not apply.³¹⁴

IX. WORKERS COMPENSATION

The courts addressed several issues related to the Workers Compensation Act during the survey period. Several provided guidance of significant note.

A. *Standing to Seek an Order of Mandate*

In *State ex. rel. Steinke v. Coriden*,³¹⁵ an attorney who practices before the Worker's Compensation Board of Indiana filed a Verified Complaint for Writs of Mandate, alleging that members of the Board violated the Worker's Compensation Act. The court found the attorney lacked standing under the general rule of standing because he did not have a personal stake in the outcome of the litigation, despite his argument that he was injured because, as an attorney who practices before the Board, he lacked access to a full-time Board, as required under the statute.³¹⁶ The court similarly concluded that the attorney lacked public standing because the rights created under the Worker's Compensation Act are private, and the nexus of harm to the public is not direct enough to confer standing under a public interest exception.³¹⁷ Finally, in dicta addressing the right to seek mandamus on a more general level, the court noted that mandamus usually seeks to compel the defendant to perform a specific act, whereas in this case, the act sought to be compelled was the more general request that the Board comply with the rules pertaining to membership requirements.³¹⁸ As the Board is an administrative body under the executive branch of state government, "the task of insuring that candidates for membership . . . are eligible to serve . . .

311. 830 N.E.2d 904 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 187 (Ind. 2005).

312. *Id.* at 911.

313. *Id.*

314. *Id.*

315. 831 N.E.2d 751 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 188 (Ind. 2005).

316. *Id.* at 754.

317. *Id.* at 755-56.

318. *Id.* at 757.

properly falls upon the executive branch, not to the judiciary.”³¹⁹

B. Temporary Employee/Co-Employee

In *Jennings v. St. Vincent Hospital & Health Care Center*,³²⁰ the court considered whether the worker’s compensation system provided the exclusive remedy to a nurse employed by a temporary employment agency to work in a hospital, where she was injured. The court of appeals, calling this a “seemingly unresolvable case,” indicated it was taking the opportunity to “point out a deficiency in our current system of worker’s compensation.”³²¹ Applying the seven factor test of dual employment adopted by the supreme court in *Hale v. Kemp*,³²² the court concluded that the hospital was an employer under the Act, as was the temporary agency, so that the nurse’s exclusive remedy against both was under the Act.³²³ The court concluded by noting that:

While the worker’s compensation scheme fulfills many needs, the rates employers pay (when they are not otherwise self-insured) will be materially affected by the safety of the workplace they provide to their “employees.” Here, we have an employer without a “workplace” and one with. The one with the workplace is shielded from traditional tort liability because it qualifies as a “co-employer.” The entire scheme should be reviewed by our General Assembly in light of our ever shrinking and “flat” world.³²⁴

C. Equitable Estoppel from Asserting the Statute of Limitations

In *Binder v. Benchwarmers Sports Lounge*,³²⁵ the court considered the affect of representations related to the employment relationship on the statute of limitation defense. The plaintiff worked at various times for the defendant bar owner.³²⁶ On one occasion when he was working in the bar, the plaintiff was injured when he tried to break up a fight. The plaintiff timely filed a claim with the Indiana Worker’s Compensation Board. Nearly two years after the incident, during the course of the worker’s compensation litigation, the attorney for the bar owner informed the plaintiff’s attorney that the plaintiff was “not acting in the course and scope of his employment at the time of the injury.”³²⁷ Only after the statute of limitations had run, did the plaintiff learn that the bar owner claimed that the plaintiff was not an employee and only working security for a third party

319. *Id.* at 758.

320. 832 N.E.2d 1044 (Ind. Ct. App. 2005), *reh’g denied, and trans. denied* (Ind. 2006).

321. *Id.* at 1047.

322. 579 N.E.2d 63 (Ind. 1991).

323. *Jennings*, 832 N.E.2d at 1054.

324. *Id.* at 1055.

325. 833 N.E.2d 70 (Ind. Ct. App. 2005).

326. *Id.* at 72.

327. *Id.* at 74.

at the time of the injury.

The plaintiff promptly filed suit and the bar owner raised the statute of limitations as a defense.³²⁸ The trial court granted summary judgment on the statute of limitations defense. Although there was no dispute the claim was filed more than two years after the injury, the plaintiff contended that the defendant should be estopped from asserting the limitations defense because of its representations regarding employment before the statute ran.³²⁹

On appeal, the defendant took the position that the statement that the plaintiff was not acting within the scope of his employment reflected the position that he was not an employee. The court noted that anyone who is familiar with worker's compensation law would understand this statement "to presume, rather than to deny, employment."³³⁰ Because the bar owner's attorney regularly handled worker's compensation claims, the court concluded that she presumably knew the law and that her letter was "intentionally deceptive."³³¹ The court concluded that this was a material misrepresentation regarding whether the bar would challenge the plaintiff's status as an employee and that the plaintiff was entitled to rely upon opposing counsel's representation.³³² The court applied the doctrine of equitable estoppel and reversed summary judgment on the statute of limitations defense.³³³

The lesson to the litigator is, of course, that opposing counsel is entitled to rely upon your representations. Quoting the supreme court, the court reminded that it has declined

to require attorneys to burden unnecessarily the courts and litigation process with discovery to verify the truthfulness of material representations made by opposing counsel. The reliability of lawyers' representations is an integral component of the fair and efficient administration of justice. The law should promote lawyers' care in making statements that are accurate and trustworthy and should foster the reliance upon such statements by others.³³⁴

X. TORT PREJUDGMENT INTEREST STATUTE PREEMPTS COMMON LAW

During the survey period, the Indiana Court of Appeals twice held that the Tort Prejudgment Interest Statute³³⁵ preempts the common law right to prejudgment interest.³³⁶ Initially, in *Simon Property Group, L.P. v. Brandt*

328. *Id.* at 72.

329. *Id.* at 73.

330. *Id.* at 74.

331. *Id.* at 75.

332. *Id.* at 76.

333. *Id.*

334. *Id.* at 75 (quoting *Fire Ins. Exch. v. Bell*, 643 N.E.2d 310, 312-13 (Ind. 1994)).

335. IND. CODE §§ 34-51-4-1 to -9 (2005).

336. *Simon Prop. Group, L.P. v. Brandt Constr., Inc.*, 830 N.E.2d 981, 994 (Ind. Ct. App.

Construction, Inc., the court noted that prejudgment interest is allowable under the common law “when the damages are capable of being determined by reference to some known standard, such as fair market value.”³³⁷ Pursuant to the statute, however, a trial court may award prejudgment interest if the plaintiff makes a written offer of settlement within the time period specified by statute, for a specified amount, and according to particular payment terms.³³⁸ In determining that the statute preempts the common law, the *Simon* court stated:

In our view, in passing this statute the legislature intended to preempt common law prejudgment interest in tort cases. To hold otherwise would be to render the statute and its requirements virtually meaningless—a party who failed to fulfill the statute’s requirements could merely turn to the common law for relief. Thus, to agree with *Landlord* is, essentially, to say that notwithstanding the statutory requirement that a tort plaintiff must make a qualifying settlement offer to recover prejudgment interest, we will allow plaintiffs who fail to do so to recover anyway. Such a result would be tantamount to decimating the statute altogether, which we shall not do.³³⁹

Recently, the Indiana Supreme Court denied a petition to transfer in this case.

2005), *reh’g denied, and trans. denied* (Ind. 2006); *see also* Gregory & Appel Ins. Agency v. Philadelphia Indem. Ins. Co., 835 N.E.2d 1053, 1065 (Ind. Ct. App. 2005), *trans. denied* (Ind. 2006).

337. *Simon*, 830 N.E.2d at 993 (citing 4-D Bldgs., Inc. v. Palmore, 688 N.E.2d 918, 921 (Ind. Ct. App. 1997)).

338. *See* IND. CODE § 34-51-4-6 to -7. IND. CODE § 34-51-4-6 provides:

This chapter does not apply if:

- (1) within one (1) year after a claim is filed in the court, or any longer period determined by the court to be necessary upon a showing of good cause, the party who filed the claim fails to make a written offer of settlement to the party or parties against whom the claim is filed;
- (2) the terms of the offer fail to provide for payment of the settlement offer within sixty (60) days after the offer is accepted; or
- (3) the amount of the offer exceeds one and one-third (1 1/3) of the amount of the judgment awarded.

339. *Simon*, 830 N.E.2d at 994.

